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Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY, PETITIONERS,

vs.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 10, 1937.

CERTIORARI GRANTED OCTOBER 25, 1937.

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VOLUME II

(536) **MANDATE.**

(Filed Jan. 12, 1937).

UNITED STATES OF AMERICA, ss:

The President of the United States of America,

To the Honorable the Judges of the District Court of the United States for the Western District of South Carolina,

(Seal of the Supreme Court of the United States)

GREETING:

WHEREAS, lately in the United States Circuit Court of Appeals for the Fourth Circuit, in a cause between Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Appellants, and Duke Power Company and Southern Public Utilities Company, Appellees, No. 4003, wherein the decree of the said Circuit Court of Appeals, entered in said cause on the 22nd day of February, A. D. 1936, is in the following words, viz:

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause, be, and the same is hereby, remanded to the District Court of the United States for the Western Dis-

trict of South Carolina, at Greenville, with directions to dismiss the bill in accordance with the opinion of the Court filed herein.

JOHN J. PARKER,
Senior Circuit Judge."

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of *certiorari*, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, the year of our Lord one thousand nine hundred and thirty-six, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here (537) ordered, adjudged, and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, reversed.

AND IT IS FURTHER ORDERED, That this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of South Carolina with directions to vacate its decrees and for further proceedings in conformity with the opinions of this Court.

December 14, 1936.

You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of *certiorari* notwithstanding.

WITNESS, the Honorable Charles E. Hughes, Chief Justice of the United States, the ninth day of Janu-

ary, in the year of our Lord one thousand nine hundred and thirty-seven.

CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court of the United States.

United States District Court
West. Dist. of So. Car.
Jan. 19, 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

(538) Copy.

ORDER PURSUANT TO MANDATE OF U. S. SUPREME COURT.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs, *vs.* Greenwood County, et al, Defendants.	Equity No. 451

NOW COME the said Duke Power Company and Southern Public Utilities Company, plaintiffs, by their attorneys, and Greenwood County and E. L. Brooks, S. A. Agnew, and E. I. Davis, as members of and constituting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, defendants, by their attorneys, and the mandate of the Supreme Court of the United States, duly authenticated under the seal of the said Supreme Court, and certified by the Clerk thereof, having been filed in this Court on January 12, 1937, whereby it appears that at the October Term 1936 of the said Supreme Court, on the 14th day of December, 1936, the said Supreme Court, by virtue of a writ of *certiorari* to the United States Circuit Court of Appeals, for the Fourth Circuit, reversed the decree of said United States Cir-

cuit Court of Appeals entered in this cause on the 22nd day of February, 1936, and ordered that the said cause be remanded to this court with directions to vacate the decrees entered herein on August 26, 1935, and on December 21, 1935, and for further proceedings in this (539) cause in conformity with the opinion of said Supreme Court;

NOW, THEREFORE, in pursuance of said mandate, it is Ordered, Adjudged and Decreed as follows:

1. That the said decrees of this court entered in this cause on August 26, 1935, and on December 21, 1935, be, and the same hereby are, vacated, to the end that further proceedings may be had herein in accordance with said mandate.

2. That the defendants be, and they hereby are, allowed three days from the date hereof within which to file supplemental answers, and that the plaintiffs be, and they are hereby allowed ten days thereafter within which to file replies to said supplemental answers.

3. That further proceedings be had herein in conformity with the opinion of said Supreme Court, and that the parties may apply, upon due notice, to this court for such other and further orders and directions as may be necessary.

This 19th day of January, 1937.

J. LYLES GLENN,
United States District Judge.

United States District Court
West. Dist. of So. Car.
Jan. 19 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

(540) Copy

SUPPLEMENTAL ANSWER.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works. Defendants.

The defendants, Greenwood County, E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board of Greenwood County, by way of supplemental answer to the amended and supplemental bill of complaint, aver:

1. That subsequent to the institution of this bill in equity, subsequent to the filing of the pleadings herein, subsequent to the taking of testimony and to the injunction order of the United States District Court of August 26, 1935, these defendants entered unto a superseding loan and grant agreement with the United States of America on the 30th day of November, 1935, a copy of which agreement is hereto attached and made a part of this supplemental answer. These defendants aver that this agreement, as shown by its terms, entirely supersedes the previous agreement of December 8, 1934 between Greenwood County and the United States of America.

2. That this agreement was authorized by a resolution of The Finance Board of Greenwood County and that thereafter The Finance Board adopted an initial

schedule of rates for the proposed project pursuant to
(541) the provisions of the statute law of the State of South Carolina.

WHEREFORE these defendants pray that their pleadings be supplemented in the manner set out herein, and that the bill of complaint be dismissed.

D. W. ROBINSON, JR.,
R. F. DAVIS,
W. H. NICHOLSON,
Attorneys for Greenwood County and The Finance Board of Greenwood County.

January 13th, 1937.

STATE OF SOUTH CAROLINA,
County of Richland:

E. I. Davis being first duly sworn, says: That he is one of the defendants in the above entitled action; that he has read the foregoing Supplemental Answer and the same is true of his own knowledge.

E. I. DAVIS.

Sworn to before me this 13th day of Jan. 1937.

CORNELIUS C. MILLER, L. S.
Notary Public for S. C.

Service accepted January 19th, 1937.

W. S. O'B. ROBINSON, JR.,
Atty. for Pltfs.

(542) Copy.

United States District Court
West. Dist. of So. Car.
Jan 19 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

SUPPLEMENTAL ANSWER.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works. Defendants.

The defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, by way of supplemental answer to the amended and supplemental bill of complaint, avers:

1. That subsequent to the institution of this bill in equity, subsequent to the filing of the pleadings herein, subsequent to the taking of testimony and to the injunction order of the United States District Court of August 26, 1935, the United States of America entered into a superseding loan and grant agreement with the other defendants herein on the 30th day of November, 1935, a copy of which agreement is attached and made a part of the supplemental answer of the other defendants herein. Defendant Harold L. Ickes avers that this agreement, as shown by its terms, entirely supersedes the previous agreement of December 8, 1934, between Greenwood County and the United States of America.

2. That this agreement was authorized by a resolution of The Finance Board of Greenwood County and that thereafter The Finance Board adopted an initial (543) schedule of rates for the proposed project, pursuant to the provisions of the statute law of the State of South Carolina, which schedule was the same as the schedule proposed to be put into effect by The Finance Board prior to the filing of its application with the Federal Emergency Administration of Public Works for the loan and grant.

WHEREFORE this defendant prays that his plead-

ings be supplemented in the manner set out herein, and that the bill of complaint be dismissed.

JOHN W. SCOTT,
Special Asst. to the Attorney General.
WILLIAM J. DEMPSEY,
Attorney for Harold L. Ickes as Federal Emergency Administrator of Public Works.

January .. 1937.

Service accepted January 19th, 1937.

W. S. O'B. ROBINSON, JR.,
Atty. for Plaintiffs.

United States District Court
West. Dist. of So. Car.
Jan 29 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

(544) **PLAINTIFFS' REPLY TO THE SUPPLEMENTAL ANSWERS OF THE DEFENDANTS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,
vs.
Greenwood County, et al, Defendants.
} In Equity

The plaintiffs, replying to the supplemental answers of the defendants filed herein on January 19th, 1937, allege:

It is admitted that while this cause was pending in the Circuit Court of Appeals for the Fourth Circuit on

appeal by defendants from the final decree of injunction entered herein on August 26, 1935, the defendants, Greenwood County and the Federal Emergency Administrator of Public Works, on November 30, 1935, entered into the contract to which the supplemental answers refer, and that on December 2, 1935, Greenwood County readopted the schedule of rates for the proposed hydroelectric project involved in this suit. But it is denied that said contract or the readoption of said rates worked any material change in the case or in the issues presented by plaintiffs' original and amended and supplemental bill of complaint filed herein and defendants' answers thereto, or in any way materially affected the proceedings herein which resulted in said final decree of injunction, which pleadings and proceedings as they appear and remain of record herein are by reference to said record made a part hereof. The changes made by the (545) substitution of said contract of November 30, 1935 for the prior contract of December 8, 1934 are matters of verbiage only leaving the loan and grant and the proposed project the same in character, purpose and effect, and subject to the same infirmities and objections, as alleged in said original and amended and supplemental bill of complaint, and as found and determined by this court in the proceedings herein resulting in said final decree of injunction. Except as herein expressly admitted the allegations of said supplemental answers, and of each of them, are denied.

WHEREFORE, plaintiffs pray that the original decree of injunction entered and filed herein be reinstated to the end that the defendants, and each of them, be permanently enjoined from constructing said Buzzard Roost project under and pursuant to said original contract of December 8, 1934, or under and pursuant to said new contract of November 30, 1935, or under and pursuant to any other form of contract whereby federal funds will be used for the purpose of constructing or operating said Buzzard Roost project, or any part thereof, and that they be given such other and further relief in the premises as the nature of the case, as shown by the proceedings had herein upon their original and their amended and supplemental bill of complaint and as made

by this reply, may require, and as to equity may seem meet.

NEWTON D. BAKER,
H. J. HAYNSWORTH,
W. R. PERKINS,
R. T. JACKSON,
J. H. MARION,
W. B. McQUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs.

(546) UNITED STATES OF AMERICA,
Western District of North Carolina,
Mecklenburg County.

Personally appeared before me N. A. Cocke, who being first duly sworn, deposes and says, that he is an Officer of Duke Power Company, one of the Plaintiffs named in the foregoing reply, to-wit, its Vice-President; that said plaintiff is a corporation as alleged in the original Bill of Complaint filed herein and he is duly authorized to make this affidavit for and on its behalf; that he has read the foregoing reply and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

N. A. COCKE.

Sworn to and subscribed before me, this the 27th day of January, 1937.

JAS. S. SEASE,
Notary Public.

Mecklenburg County, N. C.

My commission expires June 18, 1937.

UNITED STATES OF AMERICA,
Western District of North Carolina,
Mecklenburg County.

Personally appeared before me E. C. Marshall, who being first duly sworn, deposes and says that he is

an Officer of Southern Public Utilities Company, one of the plaintiffs named in the foregoing reply; to-wit, its President; that said plaintiff is a corporation as alleged in the original Bill of Complaint filed herein, and he is duly authorized to make this affidavit for and on its behalf; that he has read the foregoing reply and knows the contents thereof; that the same is true of his own knowledge, except as to the matter therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

E. C. MARSHALL.

Sworn to and subscribed before me, this the 27th day of January, 1937.

JAS. S. SEASE,
Notary Public.

Mecklenburg County, N. C.

My commission expires June 18, 1937.

I hereby accept service of plaintiffs' reply to the supplemental answers of the defendants, and acknowledge the receipt of a copy of said reply.

This January 29, 1937.

JOHN W. SCOTT,
Special Asst. to the Atty. General.
WILLIAM J. DEMPSEY,
Attorney for Harold L. Ickes, as Federal Emergency Administrator of Public Works.

I hereby accept service of plaintiffs' reply to the supplemental answers of the defendants, and acknowledge the receipt of a copy of said reply.

This January 29, 1937.

D. W. ROBINSON, JR.,
Attorney for Greenwood County and The Finance Board, etc.

(547) Copy.

United States District Court
West. Dist. of So. Car.
Feb 1 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

ORDER GRANTING PRELIMINARY INJUNCTION.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew, and E. I. Davis, Members of and consttiuting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

Equity No. 451

THIS CAUSE Came on to be heard at this term upon the motion of plaintiffs for a preliminary injunction and was heard upon the record herein, and after hearing counsel for the respective parties, it appearing to the Court that the issuance of a preliminary injunction is necessary to preserve the *status quo* pending the final determination of this cause by this Court, and to prevent irreparable injury to plaintiffs; it is, therefore,

ORDERED, ADJUDGED AND DECREED, that:

1. The defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, his attorneys, officers, agents, successors in office, and all persons acting in aid of them, and each of them, be, and they hereby are, restrained and enjoined during the pendency of this suit before this Court, and until the further order of this

Court, from in any manner aiding in the construction of the Buzzard Roost Project referred to and described in the original bill of complaint or any part of said project, except as hereinafter provided; and from advancing, (548) lending, granting, or paying over to Greenwood County, or to any officer, agent, or representative of said County, any funds whatsoever of the United States for the purpose of constructing, financing, or operating said Buzzard Roost project or any part thereof, or from otherwise appropriating or permitting to be used any federal funds in furtherance of said project, except that this order shall not be construed as preventing the payment of the legal, engineering and administrative expenses of the Public Works Administration.

2. The defendants, Greenwood County, E. L. Brooks, S. A. Agnew, and E. I. Davis, as members of and constituting the Finance Board for Greenwood County, and all other officers, agent, or representatives of said County, and their successors in office, and each of them, be, and they hereby are, restrained and enjoined during the pendency of this suit before this Court and until the further order of this Court, from receiving, accepting, or using, or permitting to be used, any funds of the United States for the purpose of constructing or operating said Buzzard Roost Project or any part thereof.

PROVIDED that the foregoing Order shall not prevent the payment to Greenwood County, and the receipt by it, of a sum not in excess of One Hundred Thousand ($100,000) for use by it in paying legal, engineering and other administrative expenses; such payments, receipts and expenditures to be without prejudice to the rights of any party. Any party may, upon notice to the other parties, apply to the Court for further orders and directions herein, including the right of the defendants to apply to the Court, upon due notice to plaintiffs, for a modification of this Order to permit the lending, granting, receipt and expenditure of funds for the purchase of necessary land should an emergency arise.

(549) PROVIDED FURTHER that the plaintiffs shall, within ten days from the date hereof, execute and file in this cause a Bond, payable to defendants, conditioned according to law, in the penalty of Fifty Thousand Dol-

lars ($50,000) and with a surety or sureties to be approved by the Court.

J. LYLES GLENN,
United States District Judge.

Rock Hill, South Carolina,

February 4, 1937.

Service accepted Febry. 1, 1937.

W. H. NICHOLSON,
D. W. ROBINSON, JR.,
Attys. for Greenwod County.

H. J. HAYNSWORTH,
W. S. O'B. ROBINSON, JR.,
et al.
Attorneys for Plaintiff.

WILLIAM J. DEMPSEY,
Atty. for Defendant, Harold L. Ickes.

United States District Court
West. Dist. of So. Car.
Jul 1 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

(550) **STATEMENT OF EVIDENCE UNDER EQUITY RULE NO. 75.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

In Equity.

Be it remembered that the above entitled cause came on for trial before the above Court sitting in equity on the 23rd day of February, 1937, pursuant to the mandate of the United States Supreme Court received and filed in the office of the Clerk of said Court January 12, 1937. W. S. O'B. Robinson, Jr., H. J. Haynsworth, C. F. Haynsworth, Jr., R. T. Jackson and W. B. McGuire, appeared as counsel for the plaintiffs. D. W. Robinson, Jr., W. H. Nicholson and R. F. Davis, appeared as counsel for the defendants, Greenwood County and its Finance Board, John W. Scott, William J. Dempsey and Robert E. Sher appeared as counsel for the defendant Harold L. Ickes, as Federal Emergency Administrator of Public Works.

The following proceedings were had:

Mr. D. W. Robinson, Jr. read the supplemental answer of defendant, Greenwood County. Mr. John W. Scott read the supplemental answer of the defendant, Harold L. Ickes. Mr. W. S. O'B. Robinson, Jr., read the reply of the plaintiffs.

The following stipulation, entered into by the parties, was presented to the court and read into the record.

STIPULATION.

It is herewith stipulated by counsel for the plaintiffs, counsel for Greenwood County and its Finance (551) Board and counsel for Harold L. Ickes, Administrator of Public Works:

I. It is the contention of plaintiffs that the evidence taken and reported herein by Wendell M. Walters, Special Master, pursuant to Order of Court dated April 29, 1935, and which is incorporated in the transcript of record as printed for the United States Circuit Court of Appeals, remains as a part of the record in the cause, that it need not be reintroduced and is not subject to any objection as to any part thereof, except as appears in the printed record. If, however, this position should be overruled by the Court, it is stipulated and agreed, without prejudice to plaintiffs' said position and any rights they may have in respect thereto, that at the trial

of this case before the Hon. J. Lyles Glenn, the plaintiffs shall be permitted to offer in evidence the testimony of any or all of the following witnesses as printed in the Transcript of Record for the United States Circuit Court of Appeals, to-wit: J. N. Stribling, J. E. Willoughby, E. C. Marshall, J. E. Sirrine, W. G. Perry, George Wrigley, C. P. Roberts, F. H. Cothran, W. D. Faucette, M. R. Kimbrell, J. M. Costello, and Charles S. Reed, as contained in the printed Transcript of Record, pages 157-264, 316-324. The plaintiffs are also to be permitted to offer in evidence the exhibits offered by them before said Special Master, to-wit, Exhibits 1-45. Any party may object to any part of this testimony or to any exhibit on any ground which would be available if the witness were present and testified in Court, except that no such objection shall be available, if the Court shall hold, as contended by plaintiffs, that said evidence remains as a part of the record of the case; and further that at the trial of this case before the Hon. J. Lyles Glenn, the defendants, or any of them, shall be permitted to offer in evidence the testimony of any or all of the following witnesses as printed in the Transcript of Record for the (552) United States Circuit Court of Appeals, to-wit: J. W. Barnwell, D. T. Duncan, G. R. Barksdale, F. R. Sweeny, J. G. Wardlaw, F. H. H. Calhoun, A. C. Bruce, Clarence E. Rose, W. A. Barnett, R. E. McCaslan, J. C. Smith, S. M. Leaman, J. H. Milford, M. G. Boyle, M. C. Willard, Emmett I. Davis and J. B. Sloan as contained in the printed Transcript of Record, pages 264-316. The defendants are also permitted to offer in evidence the exhibits offered by them before said Special Master, to-wit, Exhibits 1-66. Any party may object to any part of this testimony or to any exhibit on any ground which would be available if the witness were present and testifying in court, except that no such objection shall be available, if the Court shall hold, as contended by the plaintiffs, that said evidence remains as a part of the record of the case.

II. It is the contention of plaintiffs that the evidence taken before Judge Watkins at the hearing in Spartanburg, when the case was remanded by the Circuit Court of Appeals, did not become a part of the record and is not admissible as evidence for defendants. It is, however, stipulated and agreed that the witnesses

there examined would, if introduced on the trial before Judge Glenn, give the same testimony as they then gave as shown in the transcript of said testimony as made by Wendell M. Walters, who reported such hearing, and that said transcript of evidence may be used on the hearing before Judge Glenn as the deposition or testimony of said witnesses, with the right hereby reserved to any party to make any objection to the testimony of said witnesses, or to the admissibility of the exhibits then offered in evidence, on any ground and to the same effect as if said witnesses were present and testifying in Court on the hearing before Judge Glenn.

III. This stipulation and agreement shall not be taken or construed as waiving or affecting in any man-
(553) ner any right which plaintiffs, or any of the defendants, would otherwise have to introduce, or make use of any of the evidence herein referred to or any statement contained therein, or to introduce additional evidence, as if this stipulation and agreement had not been entered into.

(Signed by Counsel for the respective parties).

February 18th, 1937.

Mr. Robinson, Counsel for Plaintiffs: It is our position that the defendants here asked for the remand of this case on their motion, alleging that there had been a change in fact since the taking of the previous testimony and since the findings of the court, and it was upon that allegation of a supervening change that the case was sent back. The matter now before Your Honor is the question of the alleged supervening change in the facts since the decree, and the evidence now to be presented should relate to this subsequent change and not to the original issues.

The COURT: Well, I don't know about that, Mr. Robinson. It seems to me that the spirit underlying the Supreme Court's decision was to send the case back for amendment of pleading and then let the trial proceed normally *ad inito,* with the pleadings amended as the change in facts required and that then the case would come on before the District Court the second time for a

trial with the general rules governing the procedure applying to it, and in my thinking up to this point about the trial of this case I had contemplated that we would proceed in the normal way with the burden of proof being on the plaintiff and therefore entitled to open fully on the facts and the law and then the defendants would put in their testimony either by reference to the previous testimony like you would do and put in new witnesses and then you would of course be entitled to reply to it, just in a normal way.

As I read the Supreme Court's decision it seems to contemplate that the case when it comes back should be tried practically as a new case. Of course there are some legal questions that will come up during *cht* trial that I will have to rule on and on which I have an open mind and I want to hear arguments on both sides on them. I don't imagine there is going to be much precedent for a situation very much like this one, but it is a question of how far the previous decision of the Circuit Court of Appeals is the law of this case. For example, it is a question we are going to have to thrash out somewhere. But even with all of those questions in here, I think the Supreme Court seemed to indicate they thought the case ought to be tried practically anew, and if that is so, of course the normal way it would be tried would be for the plaintiffs to develop their case fully; then the defendants and then you would be entitled to reply. Now, if in the trial of the case in that way this question about the force and effect of the previous history of the case comes up, why then it is one of the legal questions this Court will have to rule on, as I take it. I rather think we ought to proceed to try the case in the normal way.

Mr. ROBINSON: Of course, I don't want to discuss any matter about which Your Honor has a firm opinion.

The COURT: I am rather firm in the view Mr. Robinson that we ought to proceed to try the case in the normal way.

Mr. ROBINSON: In order to present the question plaintiffs desire to file the following motion:

"Plaintiffs move the Court to hold and rule:

1. That the mandate of the Supreme Court does not require a rehearing of the issues raised by the original

(554) pleadings which were tried and determined by this Court prior to the entry of the original decree of injunction of August 26, 1935, or a review of the findings of this Court on said issues, except to the extent that this Court should find that said original findings have been displaced or otherwise materially affected by facts which may have supervened since the entry of said original decree of injunction.

2. That the retrial of the cause be restricted to the issues raised by the supplemental pleadings filed by the parties since the receipt of the mandate of the Supreme Court and pursuant to said mandate, which issues relate to the alleged supervening facts since the entry of said original decree of injunction.

Respectfully submitted.

H. J. HAYNSWORTH,
R. T. JACKSON,
W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs."

The COURT: You may hand it up to me. The motion will be denied.

Mr. ROBINSON: Plaintiffs would like to take an exception.

The COURT: Objection and exception taken and allowed.

Mr. ROBINSON: Now if your Honor please may I make this further statement that the plaintiffs in introducing their testimony do so subject to the position which they have taken in the motion. I do that because it is the position of the plaintiffs that no evidence bearing upon the original issues and which might have been introduced on the original hearing is now admissible, and of course by proceeding first as Your Honor has suggested we may appear to be waiving that position.

The COURT: I understand that you are not.

Mr. ROBINSON: Because in order to comply with (555) Your Honor's ruling we must put on any additional evidence which we have on the original issues.

The COURT: That is right.

(556) **PLAINTIFFS' EVIDENCE.**

C. S. REED, a witness for the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am still connected with the Duke Power Company in the same capacity in which I was connected when I testified before Mr. Walters, Special Master, in this case, in June, 1935, during the course of which testimony I described my connection with the Duke Power Company as being that of Director and gave my qualification as rate expert.

I have examined the new rate resolution of Greenwood County adopted December 2, 1935. The rates of the proposed Buzzard Roost Plant as set forth in that resolution are materially lower than the established rates for the Duke Power Company.

The rate resolution of The Finance Board contains three schedules, A, B, & C. Rate A covering the wholesale service to municipalities is approximately thirty per cent lower than the similar rates of Duke Power Company. Rate B covering service to industrial consumers is about twenty-one per cent lower than Duke Power Company's textile rate and about twenty-five per cent lower than Duke Power Company's rate to industrial consumers. Rate C covering service to rural consumers is twenty-six per cent lower than the Duke Power Company's residential rate, which is its rural rate.

Q. Now, Mr. Reed, if the Duke Power Company reduced its rates in Greenwood, Newberry and Laurens counties, in which the Buzzard Roost plant would operate, to the level of that plant so as to retain its customers and business in those counties, what effect would such a reduction have on the rates of the Duke Power Company in the remainder of the territory in which it operates?

MR. D. W. ROBINSON, JR., counsel for defendants: (557) That is a question of law on which this witness, we submit, is not competent to testify.

COURT: It looks to me like it is a question of fact.

Of course, you take the position that the statutes about discrimination would come into effect.

Mr. D. W. ROBINSON, JR.: I understand that would be a controlling factor.

Mr. W. S. O'B. ROBINSON, JR., counsel for plaintiffs: I am asking for the practical effect, as a matter of fact, aside from any question of legal discrimination.

COURT: I think the question as so limited is entirely proper.

Mr. SCOTT: Before ruling Defendant Ickes would like an objection.

COURT: All right, the Court rules the question as explained by Mr. Robinson is entirely proper and the witness is a witness who would probably know if anybody would and therefore it is entirely proper for him. Exception taken by both defendants and exception allowed.

A. (By Witness): We would necessarily have to make the same reduction not only in other parts of South Carolina in which the Duke Power Company operates, but also in those parts of North Carolina in which the company does business. The Duke Power Company's system has always maintained uniform rates.

COURT: As a matter of history over what period of years?

A. As far back as I have any recollection and as far back as I can find from the record. It has maintained uniform rates throughout the entire territory in which it operates and such uniformity is necessary.

Practically all the customers with whom the Buzzard Roost plant has made contracts for the sale of its output in Greenwood, Laurens and Newberry counties, are at present the customers of the Duke Power system and have been customers for a number of years. Also most of the customers of power listed by the Buzzard Roost plant as prospective customers, to whom the plant may be able to sell the rest of its output are customers now of Duke Power Company system and have been customers for a number of years. Those customers have expressed no dissatisfaction.

(558) They have made no complaint as to service and it is only because of the lower rates that the proposed plant has been able to take the customers away from us.

If the Duke Power Company reduced its rates in the Counties of Greenwood, Newberry and Laurens in order to retain its customers in those counties, it would have to make the same rates throughout the entire territory in which it operates. It could not maintain one set of rates in those three counties and higher rates in other parts of its territory for the same class of service.

Without regard to any question as to whether an attempt to reduce the rates in those three counties and at the same time to maintain the present rates in the remainder of the State of South Carolina would constitute a discrimination which would not be permitted as a matter of law, I ask you as a practical matter whether such a condition could exist? A. I don't believe it could, it would cause such dissatisfaction among the customers, such a loss of business and such a loss of good will that the company could not even attempt to maintain higher rates in some parts of its territory while reducing its rates in the three counties. Furthermore, if the Duke Power Company reduced its rates in those three counties, the project would be forced to likewise reduce its rates below the present level.

Objection by defendants to this testimony by the witness.

COURT: This is the opinion of a man who has studied rate questions over a long period of time and over a large area. I think the testimony is highly admissible.

Mr. SCOTT, attorney for the Administrator: We are not here trying a rate case.

COURT: Of course not; but one of the main contentions of plaintiffs is that what is being done by the Administrator here is unconstitutional because it is accom-
(559) plishing indirectly what the federal government or an agency of the federal government cannot do directly.

SCOTT: Of course we don't justify the acts of the Administration under the Commerce Clause.

COURT: So far as this particular question is concerned I am glad to have the benefit of this witness' opinion, but I think I have imagination enough to come to the same conclusion whether he testifies to it or not. If one utility is serving a given community and another utility comes in with a lower rate, the practical business man is going to buy at the cheaper rate. The fact that one utility is financed by private capital and the other by the government isn't going to keep him from buying at the lowest rate, especially when he is spending thousands of dollars per year for power. The testimony of this witness is that if the Greenwood County project charges lower rates it will pull the Duke rates down. On the other hand if the Duke Company should put in a rate lower than the project's rate, the project would have to put in a still lower rate.

The witness continued:

If the Duke Power Company did not reduce its rates to meet the competition of the Buzzard Roost plant, it would lose its business in the three counties, certainly to the extent that the output of the Buzzard Roost plant could supply the customers of Duke Power Company in those counties.

Q. Now, Mr. Reed, what other effect, if any, would the establishment of this plant and the lower rates charged by it for power have on the rates and business of the Duke Power Company if it did not immediately reduce its rates so as to try to hold the business. A. The lower rates of the Buzzard Roost plant apply to cotton mills, municipalities and other classes of service similar to the classes of service served by Duke Power Com-
(560) pany. If the mills, municipalities and other consumers of power in those three counties were given lower rates than the rates charged by Duke system for the same kind of service, there would be constant pressure brought to bear on the Duke system to reduce its rates to the level of the Buzzard Roost rate, and if it did not meet this demand it would seriously disturb the relationship between it and its customers and cause it to suffer constant loss of business.

COURT: You mean that is your opinion.

WITNESS: That is my opinion.

Mr. D. W. ROBINSON, JR.: I would like for you to strike that out as a question of opinion.

COURT: Motion overruled. If a man dealing with rates doesn't know out of his experience what the probable course of conduct would be, I think you might as well rule out all expert testimony. I think the testimony is entirely proper.

Mr. D. W. ROBINSON, JR.: Note the objection.

COURT: The testimony is objected to by both the defendants. Exception taken and allowed.

A. (Witness continuing.) For example, industries served by Duke Power Company are in close competition with the industries which would be served by the Buzzard Roost plant. The lower power costs of those served by the Buzzard Roost plant would give them a decided advantage in competing with similar industries served by Duke Power Company. The Duke Power Company would be faced with making material concessions to that demand that its rates meet the rates of the Buzzard Roost, and the lower rates of the project would be a controlling factor in forcing a reduction of the Duke rate.

If the Duke Power Company reduced its rates to the level of the rates of the Buzzard Roost plant, the effect would be that the net earnings of the company would be practically wiped out—that is leave nothing to pay bond interests or any return on the capital.

(561) I have examined the contract of December 8, 1934, between the County and Federal Government under which it was originally proposed to construct the plant; the new contract of November 30, 1935, under which the plant would now be constructed; the application of the County to the Public Works Administration; the application to the Federal Power Commission for a license; the original rate resolution adopted by Greenwood County in October, 1934; and also the new rate resolution adopted on December 2, 1935. The new rate resolution of December 2, 1935, adopts the same rates as those adopted by the original resolution of October,

1934. The new contract of November 30, 1935, and the new rate resolution of December 2, 1935, make no change in the rate or in the plant to be constructed. The construction of the plant under the new contract and its operation under the rate resolution of December 2, 1935, would have the same effect on the property and business of the Duke Power Company as if the plant had been constructed under the original contract of December 8, 1934, and operated under the original rate resolution of October, 1934.

CROSS EXAMINATION.

I am a Director of Duke Power Company. In 1934 our Company lost some large power consumers in the Town of Clinton, S. C.—the Clinton Mills, the Bailey Mill, and the Town of Clinton. Yes, I believe the mills built a steam plant and took from the Duke Company two cotton mills and the Town of Clinton. I believe the Town and the two mills used about 12,000,000 kilowatt hours of power a year. That is approximately the same amount of power for which the proposed Buzzard Roost plant has made tentative contracts with customers of the Duke Power Company. We did not lose a large number of large customers during the years of the depression in the Carolinas.

Some textile mills which were our customers have built steam plants of their own. I could get you the in-
(562) formation as to such mills but I haven't it with me.

Yes, since the loss of the Bailey Cotton Mills at Clinton the company has continued to do business. Yes, it has continued in Laurens County in which Clinton is located.

The last few years our sales have increased substantially. In 1936 the kilowatt hours sold were the highest in the records of the system—at least since 1929. The gross revenue for 1936 exceeded the gross revenue for any year since 1929. These facts are shown by the statements which the Company has furnished the defendants.

(The statement of Duke Power Company's sales in kilowatt hours and gross revenue was later introduced as Defendants' Ex. 90, attached hereto.)

The second list you hand me appears to be our output for the same years.

(Statement of Duke Power Company's kilowatt hour output for 1928-1936 was later introduced as Defendants' Ex. 91, attached hereto.)

The Duke Power Company is at the present time building an addition to its River Bend steamplant located in North Carolina between Gastonia and Charlotte. The Board of Directors, of which I am a member, authorized the building of one additional unit. The unit will produce several times the power of the Buzzard Roost plant, if the unit is run and not used as a standby unit; it may not produce anything; it will depend on the condition of the water. The capacity of the plant is 55,000 kilowatts as compared with 15,000 of Buzzard Roost. The plant is a standby and will act as an emergency unit for the entire Duke system. The system is all tied together. We can't trace individual kilowatt hours.

We have no protests of service from the customers I (563) referred to in my direct examination. I have no recollection of a protest from the Town of Greenwood as to rates or service. There may have been one, I don't know. There are a number of people they could protest to and I would not hear about, but generally, protests on rates would reach me—at least in recent years. I am not in charge of the service department of the Company, but I am acquainted in general with our service, and it is of excellent quality and we have very few complaints. If complaints as to service were serious I would hear about them.

At Greer the Duke Power Company has a distributing system in a municipality where there is also a municipal plant. No, we have not reduced our rates there. We have not had to reduce our rates by reason of that over the entire system. There is not much difference between the rates. I think our rates are lower than Greer's, but I am not sure. No, we have not had to reduce our rates on account of Mr. Bailey selling the Town of Clinton. No, we have not reduced our rates over the entire system specifically on account of the opening of that plant in Clinton in 1934. It would have to be taken into consideration in designing our rates.

Since November, 1933, the Duke Power Company has made reductions as follows: In September, 1934; in February, 1935; in March, 1936, and in November, 1936. The 1934 reduction was after conferences with and an order of the South Carolina Utilities Commission. These reductions have materially reduced the net earnings of the Company. The reductions had little to do with the increase in sales as there was no increase in revenue per customer.

The generation of power by the Duke Company increased approximately 380,000,000 kilowatt hours from 1935 to 1936. The Buzzard Roost plant would be a 15,000 kilowatt plant. I do not know the number of kilowatt hours it would produce. Assuming, as you do, it would produce 25,000,000 kilowatt hours the Duke increase in generation would be about 16 times that amount. So (564) far as kilowatt hours are concerned it is very small in proportion to the total increase.

As to whether, as a matter of fact, the development of the Greenwood County Project would materially hurt Duke Power Company, I would say that although it was very small in numerical ratio, about the same as a rat would bear to the steamship Normandie, if that rat is cholera infected it is of considerable importance to the ship. It is very small in actual quantity, but very large in potentiality.

Yes, I believe if Buzzard Roost is completed, its development will seriously damage Duke Power Company, not because of its size but because of its nature. The element connected with its nature that will damage Duke Power Company is that it is Government subsidized and unfair competition by reason of it paying no taxes. It can quote lower rates and that will act as a yardstick on all rates.

It is not usual for municipal plants, whether Government subsidized or not, to pay taxes. The quantity of the power which the Greenwood County project, if developed, would take away would not by itself in dollars and cents seriously damage the Company.

RE-DIRECT EXAMINATION.

Leaving out of account any injury and damage the Duke Power Company would sustain throughout the ter-

ritory in which it operates by reason of the reduced rates established by the Buzzard Roost plant, and confining myself to the loss of business in the three counties, this would be in excess of a quarter million dollars annually, if the Buzzard Roost plant sold the entire output to the present customers of the Power Company.

The municipal plant at Greer, S. C., was not constructed by means of a PWA loan and grant. It was constructed more than ten years ago and is a distribution system, purchasing its power from the Duke Power Company.

RE-CROSS EXAMINATION.

The $250,000.00 loss I spoke of would be in the gross income of Duke Power Company.

RE-DIRECT EXAMINATION.

But the loss in net income would be practically the same, as there would be very little reduction in expenses.

RE-CROSS EXAMINATION.

It is not true that if Duke sells power in addition to that sold last year, practically all the increase in our gross is net income, because additions in gross often en-
(565) tail considerable additional investment. For instance, we built about 1,500 miles of rural lines to get that additional gross last year. A reduction in gross does result in a reduced net.

COURT: The difference is plain, isn't it? What you are talking about is loss of gross income in a territory where you have already built your lines and are ready to operate and supply the power, whereas increase in gross in new territory is quite a different matter from the standpoint of your earnings, aren't they?

The WITNESS: It is, for the reason compare the 1929—

COURT: You already have your lines in the Greenwood area?

The WITNESS: We have.

COURT: That is the reason you say the loss of income there is very nearly the loss of net?

The WITNESS: It is.

COURT: Whereas if you built a new line into new territory, you would have to fund that investment over a period of years, maybe? Isn't that right?

(566) The WITNESS: We have made very substantial investments, for instance comparing the 1929 gross earnings.

COURT: Let's get that clear before we go any further. Suppose the same year that you lost $250,000 out of your Greenwood territory where you already have enormous investment, and it practically became useless and you built a half million dollar extension in some other territory, and even if you earned $250,000 gross there the earnings from that territory would have to be reduced until you paid for the investment made in new territory, isn't that right?

The WITNESS: It is.

The witness continued under cross examination of counsel:

Yes, if Greenwood sold its entire output in the Greenwood area we would probably have some business left because they couldn't get every customer. I don't think they could get our Piedmont & Northern Railway Company. If they sold their twenty-five million kilowatt hours I don't think that would be more than our total kilowatt sales. The total estimated gross revenue of the project is about $300,000.00 and we have a half million gross in that territory. The sale to the Piedmont & Northern Railroad was not included in that figure. There are some mills there that were not listed as prospects by the Buzzard Roost project. I do not know how many kilowatt hours we sold in Greenwood County not having the figure by counties.

(567) J. E. SIRRINE, a witness for the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I testified in this case before Mr. Walters, the Special Master, and at that time stated my qualifications as

hydraulic engineer. In addition I have had considerable experience, extending over more than forty years, with the textile industry in the Piedmont section of North and South Carolina where the Duke Power Company operates. I have acted as engineer for a large number of textile mills and have had experience in the operation of such mills, being an executive officer of several and a director of about twenty-three.

I have had occasion to study the question of power rates and power costs from the standpoint of the producer and seller of power and from the standpoint of the consumer and purchaser of power. Since 1902 I have been called in a great many times by textile mills to consider the question of power cost. In some cases by new mills—whether they should build a plant to generate their own power, or purchase it—and in some cases to consider whether mills should abandon plants already built and purchase power.

Q. Now, Mr. Sirrine, if the proposed Buzzard Roost plant should be constructed and should be operated in the three counties of Greenwood, Newberry and Laurens, at the rates set forth in the county's rate resolution of December 2, 1935, and assuming for the purpose of my question that those rates, so far as concerns wholesale service to municipalities, are approximately 30% lower than the established rates of the Duke Power Company, and so far as concerns the rates to textile mills are ap-
(568) proximately 21% lower than the corresponding rate of the Duke Power Company, and so far as concerns other industrial consumers are approximately 25% lower than the rate of the Duke Power Company, what in your opinion would, as a matter of fact, be the effect on the business and rates of the Duke Power Company in the entire Piedmont territory over which it operates?

Mr. D. W. Robinson, Jr., counsel for defendants: We interpose our objection on the ground that the witness is asked to give an opinion which will in its nature be speculative, and we submit that the conclusions to be drawn from established facts are for the court to make and not for the witness.

The Court: Well, here is a witness who has spent a number of years as an expert textile engineer.

Mr. D. W. ROBINSON, JR.: Will Your Honor allow us an exception.

The COURT: Yes, exception allowed.

A. The first effect would be the loss of whatever business they had, that the Buzzard Roost plant had capacity to sell. I do not know just what particular customers that would be but I do know as a practical matter that such of their customers as were in reach of Buzzard Roost and could be served by it would immediately undertake to get their power from that source because of the difference in rate. The indirect effect, which would in my mind be perhaps more serious, would be a disturbance of the present satisfactory relationship between Duke Power Company and its customers and the immediate demand by those customers for a reduction in rates. The textile business is highly competitive and the cost of power is an important element in their operations, running into a good deal of money annually. Each unit of the industry must of necessity keep its costs in line (569) with its competitor or it will have to operate at a reduced income or at a loss.

Take even a mill using as small an amount as 600,000 kilowatt hours a month, which is perhaps below the average in size, a reduction of the rate of 21% would mean more than $16,000 a year, which is an amount entirely too big for them to overlook. As to exactly how far that pressure would go and how it would be exerted nobody could say with absolute exactness, but it is obvious there would be a very determined drive to get the rates down. That would be the case almost immediately. If the argument that a lower rate was necessary for them to compete on equal terms wasn't sufficient to get their rates down to the competing rate, then they would begin with whatever other pressure they could exert. They wouldn't stop until they got something. Now it is almost certain that the Duke Power Company would have to make some concessions. As to whether the Company would have to go this low or not would depend on circumstances, but it would be under pressure constantly from every customer, whether he was in transmission distance of Buzzard Roost or not, to get his rates down, and I think it would extend to the whole system. As a

practical matter I think it would be utterly impossible for the Duke Power Company to reduce its rates to textile mills in the three Counties of Greenwood, Newberry and Laurens and not make reductions in other parts of the territory, because if they did, there would not only be a storm of protest raised but other methods would be resorted to to get the rates down.

Mr. SCOTT, counsel for defendants: We move *the* strike out the *witnesses* answer.

The COURT: I think it is perfectly proper testimony. The motion is denied and an exception allowed.

(570) The COURT: Give some of the reasons, Mr. Sirrine, on which you base the conclusion that it would be necessary for the plaintiffs to maintain practically the same rate.

The WITNESS: They are public utilities and have to treat all customers alike. If they did not the result would be a complete demoralization of the business not only for them but for their customers.

The steam plant put in by the mills in Clinton, S. C., was begun in the early part of 1933. Steam plants of that character were about 25% cheaper then than they are now.

In some cases where mills had use for process steam steam plants have been very profitable; in other cases they have been unprofitable. So much depends on the number of hours they run and on the price of coal that you have to judge every case by itself. In 1933 coal was cheaper. The cost of electrical energy an hour is not a constant thing. It depends entirely on the size of the load and load factor. Quite often one textile plant might handle it where another could not. A textile mill that operates regularly twenty-four hours a day would have a very great advantage in putting in a steam plant as compared with one that did not operate so long and with such regularity. If it should become established that textile mills generally could put in steam plants and reduce their power costs as compared with the rates of Duke Power Company, the Company would have to reduce its rates or go out of business. The steam plants then would serve as a very severe yardstick.

CROSS EXAMINATION.

Yes, if a number of textile mills in a community put in steam plants of their own, without any financing or (571) connection with either the State or Federal Governments and their generating costs lessened the costs of the power bought from Duke that situation would have the same effect on Duke Power Company as far as their business is concerned. I do not know that the installation of the steam plant by Mr. Bailey, at Clinton, and the taking away of two textile mills in the Town of Clinton from Duke has affected Duke's rates but it has affected its business. No, Mr. Bailey's plant would not affect Duke's business to the same extent as the Buzzard Roost plant. The Clinton Cotton Mills and Lydia Cotton Mills were building a plant to serve themselves. To that extent they don't have to pay any hydraulic tax; the extent to which they are serving outside customers is comparatively small and while it undoubtedly had an adverse effect in the loss of business, I don't think that the effect was so far reaching as this would be.

A substantial portion of that Clinton power is sold to the Town of Clinton. I do not know what the percentage is but it is not by any means half. I understand that the Town of Clinton and both of the cotton mills there were customers of Duke prior to the building of this plant.

I do not remember to what textile plants Greenwood County proposes to sell power, although I have seen the list of such mills. I do not know that Greenwood County has a contract with any textile mill. It was my understanding that it was offering power to textile mills. If the power is not sold to any textile mills but chiefly to the municipalities of Greenwood, Newberry and Laurens Counties, it would still have some effect on Duke's business because Duke Power Company has a great number of municipalities on their lines. The effect on their textile customers might not be so great but the effect on their municipal customers would be. I do not know what municipal customers Duke Power Company has, but I do know they have some.

(572) We were consulting engineers for a County project in Crisp County, Georgia, where the County was

building a plant to compete with an established utility.

We were employed by the Duke Power Company to make an appraisal of their property which was to be used for rate making purposes in hearings before the Utilities Commissions of the two Carolinas. The appraisals have never been used because the hearings have never taken place. During 1932, 1933 and 1934 the Duke Power Company was the biggest single client of our office.

Plaintiffs offered Public Works Order No. 83 as their Exhibit 46, Public Works Press Release No. 709 as their exhibit 47, Press Release 18366 as their exhibit 46, a letter of the Federal Emergency Administration of Public Works to the State Engineers dated November 8, 1933, as their exhibit 49. They also offered the deposition of Frank T. Post with the ten exhibits attached thereto. Plaintiffs' exhibits 46, 47, 48, 49 were produced by defendant Ickes pursuant to notice and order to produce and the authenticity of these documents was admitted by counsel for the defendant Ickes. Counsel for Greenwood County admitted the exhibits were correct copies of the original documents.

To each of these exhibits and to the deposition the defendants severally objected upon the following grounds:

Mr. D. W. ROBINSON, JR.: As to the press releases, Nos. 46, 47, 48, 49 we object to the introduction upon the ground that there is no proof as to who gave out the statement and there is no proof of the authority of the person giving out the statement, there is no proof that the statement is authentic; that the person issuing the statement was not offered as a witness in Greenwood County and we had no opportunity to cross examine him; that it is hearsay and not the best of admissible evidence, irrelevant, and it is not admissible as an admission against interests as far as Greenwood County is concerned. Upon the further ground, that the contract and dealings between the Public Works Administration and Greenwood County are set out in contract form, that that contract is plain upon its fact and needs no extraneous evidence to explain it.

In regard to the telegrams and letters contained

in the Post deposition, we object to the introduction of those papers and that deposition upon the same grounds stated above. We adopt also the grounds urged by the District Attorney in cross examination, as set out in the Post deposition. We object upon the ground that it relates to a project entirely distinct from Greenwood County; that some of those letters and telegrams are self-serving declarations from the Duke Power Company. Now, if your Honor please, those are my objections.

Mr. SCOTT: I don't want to unduly encumber the record, but that there may be no misunderstanding, let it show that the defendant Ickes, adopts the objection of Greenwood County, in addition to the ones previously made in regard to the evidence here before the Court.

Mr. JACKSON: I should like to make clear as to the exhibits numbered one to ten attached to the Post deposition; we offered those which were signed by Mr. Ickes or the Electric Power Board of Review just as we offered similar correspondence. The other matters were offered merely for the purpose of showing the continuity of the correspondence, and not as proof of the contents or the things stated therein.

COURT: I will admit exhibits 46 to 49 and the Post deposition with the 10 exhibits thereto attached. Plaintiffs' exhibits 46 through 49 and the Post Deposition with the Exhibits 1 to 10 attached thereto are admitted in evidence.

Defendants excepted to the rulings of the court as to the admissibility of each of these exhibits and the deposition. Exceptions are allowed.

Plaintiffs' Exhibit 46, Order No. 73, Federal Emergency Administration of Public Works, dated May 9th, 1934, Washington, D. C., entitled "Establishment Electric Power Board of Review," is as follows:

P. W. 11561

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

May 9, 1934—Washington, D. C.

Order No. 73

Establishment Electric Power Board of Review.

Effective May 9, 1934 the "Electric Power Board of Review" is established, membership, Henry T. Hunt, Morris L. Cooke, and Otto M. Rau.

It will be the duty of this Board to review disapprovals, and special conditions imposed, by any division of P.W.A. and to make recommendations to the Deputy Administrator with regard to applications of public bodies to finance the construction, repair, improvement or extension of electric power plant facilities.

The Technical Board of Review is instructed to refer to said Board, Henry T. Hunt, Chairman, Room 5139, (573) all such projects now pending before it on which it has not given notice of hearing.

The Projects Division is instructed to refer to Mr. Hunt summary report folders for such applications as have heretofore been and may hereafter be disapproved by any division or approved with any special conditions appearing on any divisional report.

The Electric Power Board of Review is directed to formulate and submit to the Administrator instructions for the guidance of the several divisions with regard to competitive situations and other controversial question affecting this class of projects.

HAROLD L. ICKES,
Administrator.

Plaintiffs' Exhibit 47, Press Release No. 709, Federal Emergency Administration of Public Works, announcing the establishment of the Electric Power Board of Review, is as follows:

P. W. 11780

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

PWA PRESS SECTION Release No. 709

Immediate Release

A Public Works Administration Electric Power Board of Review has been established Public Works Administrator Harold L. Ickes today announced.

This Board will be comprised of Henry T. Hunt, General Counsel of WPA, Morris L. Cooke, Chairman of the Mississippi Valley Committee, and Otto M. Rau, Counsellor for the Administrator. Mr. Cook is a Pennsylvania authority on Power development and Mr. Rau is a qualified expert on Utilities Costs and Operations.

It will be the duty of this Board to review the approval and special conditions imposed by any division of (574) PWA and to make recommendations to the Deputy Administrator with regard to applications of public bodies to finance the construction, repair improvement and extension of electrical power plant facilities.

Because of the wide variety of conditions under which such applications are made, the controversial nature of certain of the projects and the important economic factors involved in the general questions of power development, Administrator Ickes has decided such projects should receive the attention of the new Review Board comprised of men who have made detailed studies of the issues involved and who are fully informed on various developments in this field.

The Administrator ordered the Technical Board of Review and the Projects Division of PWA to refer such applications to the Electric Power Board of Review.

The Administrator directed the Power Board to formulate and submit instructions for the guidance of various PWA decisions with regard to controversial questions affecting this class of projects so that uniform policies and handling of these questions might be evolved.

Plaintiffs' Exhibit 48, P. W. 18366, entitled "President's Letter Creating National Power Committee" dated July 16, 1934; established "in the Public Works

Administration (of) a Committee called The National Power Policy Committee", with Secretary Ickes as Chairman of the Committee.

Plaintiffs' Exhibit 49 communication entitled "Federal Emergency Administration of Public Works To State Engineers", dated November 8, 1933, and signed H. M. Waite, Deputy Administrator; is as follows:

(575) FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

November 8 1933

To State Engineers:

A number of inquiries have come in to me regarding our attitude and procedure in regard to application for loan for municipal light plants. I have prepared the present letter to set forth my views.

It seems to me that we should do all in our power to prevent becoming embroiled in local political disputes. I think it is going a bit too far and creates an unnecessary amount of work to notify all of the utilities companies when a municipal utility application comes in. Isn't it a fact that when you hear one argument you hear all of them? In principle they are the same. After all, the question for you to decide is one of whether or not it is engineeringly economically and socially sound.

The entire procedure of the utilities company is one of delay. You find this everywhere. We are most anxious to set up around the country sound publicly owned utilities as yard-sticks to determine the principle of whether or not communities can satisfy themselves and give lowered rates of electricity.

Where you do find it necessary to have a hearing, both sides, of course, should be present. I cannot see why it is necessary for the utilities to get into the whole file. If you do this, you immediately get into a three-cornered engineering discussion, the utilities, the applicant and ourselves. As far as the engineering is concerned, I don't think it is any of the utilities' business. Your engineering force, together with the engineering which has been done by the applicant and which will be checked here, is sufficient.

(576) If the utility desires to file a brief or be heard, and you decide it is necessary and advisable to do so, you can give them enough of the facts on which they can prepare their brief.

H. M. WAITE,
Deputy Administrator.

PW 1073

(577) FRANK T. POST, whose deposition was duly taken pursuant to notice properly served, and duly returned to the Court, testified as follows:

DIRECT EXAMINATION.

I live at Spokane, Wash., and am President of the Washington Water Power Company, having held this office for six years last past. I served as attorney for this company from December, 1909, until August, 1930, during which time I was Vice-President for a while.

The Washington Water Power Company is a public utility company, its *principle* business being the generation and sale of electric energy in eastern Washington and northern Idaho. It serves some 20 odd counties in the two states and also owns a few water systems.

It serves Coeur d'Alene, Idaho, a City of about 8,000 people.

The City of Coeur d'Alene made an application to the Public Works Administration for a loan and grant. The ordinance authorizing the application was passed by the City Council on November 2, 1933. I have a certified copy of the ordinance. The bond issue which the ordinance authorized were general obligation municipal coupon bonds in the principal amount of $300,000.00, and the City was authorized to incur a municipal indebtedness in that amount for the purpose of acquiring by purchase or construction a light and power plant for the City.

(The ordinance was introduced and admitted in evidence as Post Exhibit No. 1, the material parts of said exhibit being hereto attached.)

In pursuance of this ordinance authorizing general obligation municipal coupon bonds for $300,000.00, the

(578) City of Coeur d'Alene in December, 1933, made application to the Public Works Administration for a loan and grant. Our company filed a protest. No official action in Washington was taken until after the expiration of many months and until on or about November or December, 1934.

I had an exchange of telegrams and letters with Mr. Ickes, Public Works Administrator, about the matter, and I have with me either the originals or copies of the letters and telegrams.

The first is a telegram dated November 7, 1934, which I sent to Secretary Ickes. A copy of this telegram was introduced and admitted in evidence as Post Exhibit No. 2, which is hereto attached.

I received a reply to that telegram from Harold L. Ickes, Administrator. I have with me the original which I received from the telegraph company.

This telegram was admitted in evidence as Post Exhibit No. 3 and reads as follows:

C47 58 GOVT-G WASHINGTON DC 12 630P

F T POST
PRESIDENT THE WASHINGTON WATER POWER CO SPOKANE WASHN-

RETEL SEVENTH DOCKET 6695 COEUR-DALENE CITYS PROPOSED ELECTRIC RATES CONTEMPLATE TWENTY PERCENT REDUCTION STOP PROPOSED WATER DEEMED BETTER QUALITY THAN YOURS STOP YOU HAVE ALREADY HAD OPPORTUNITY MEET CITYS PROPOSALS HOWEVER IF YOUR COMPANY PLACES IN EFFECT RATE REDUCTION EQUAL OR GREATER THAN THAT OF CITY ELECTRIC POWER BOARD OF REVIEW WILL CONSIDER MATTER FURTHER

HAROLD L. ICKES ADMINISTRATOR

These telegrams were all set up in the complaint in the case of Washington Water Power Company against Officers of the City of Coeur d'Alene and Mr. Ickes and are admitted by the answer.

I replied to Mr. Ickes' telegram of November 12, 1934 (Exhibit No. 3), by telegram dated November 15, 1934, a carbon copy of which I produce. This carbon original (579) was introduced in evidence as Post Exhibit No. 4, copy of which is hereto attached.

In reply to my telegraph of November 15, 1934, to Mr. Ickes (Exhibit No. 4), I received a telegram dated November 17, 1934, signed by Mr. H. T. Hunt, Chairman of the Electric Power Board of Review, for the Administrator. Mr. Hunt was Chairman of that Board and was also attorney for Mr. Ickes as Administrator of the Public Works Administration and appeared as such in our litigation. I have with me the original telegram received from Mr. Hunt. This telegram was admitted in evidence as Post Exhibit No. 5 and reads as follows:

WESTERN UNION

SKI 13 GOVT f WASHINGTON DC 149 P NOV 17 1934

F T POST, Pres—THE WASHINGTON WATER POWER CO

RETEL ADDRESSED ICKES WILL CONSIDER POINTS AND WILL ADVISE CITY OFFICIALS OUR CONCLUSIONS

H T HUNT
CHAIRMAN ELEC POWER BOARD REVIEW FOR THE ADM.

1127A

Later I received in due course of mail a letter from Mr. Hunt dated November 26, 1934, the original of which I produce.

This letter was admitted in evidence as Post Exhibit No. 6 and reads as follows:

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS
ELECTRIC POWER BOARD OF REVIEW

WASHINGTON, D. C.
November 26, 1934.

Mr. F. T. Post,
President,
The Washington Water Power Company,
Spokane, Washington.

Dear Sir:

Your telegram of November 15 addressed to the Administrator, relative to the Coeur d'Alene, Idaho, pro-
(580) ject, Docket No. 6695, has been referred to me for reply.

You state that the original application contains no proposal of a reduction in rates. However, Mayor Coe conferred here with Mr. O. M. Rau of this Board and with me, and we advised him that a substantial reduction in rates would be required. The loan agreement with the City will contain a condition that the City adopt a rate ordinance satisfactory to the Administrator and no funds will be supplied for construction of the project unless such an ordinance is adopted. To be sure that there will be no misunderstanding in this matter I have written to Mayor Coe the letter dated November 21, of which copy is enclosed.

You state also that the plant will not cover the entire city. We have found, however, that the plant as described in the applications covers all consumers within the city limits exclusive of large industrial consumers now served by your company.

You refer to taxes paid by the utility, the loss of which is not taken into consideration. The project indicates income over and above operating costs and debt service charges to average in excess of $24,000 during the period of this loan, with 80% of the existing consumers served by the proposed municipal plant. The income available for general fund purposes after the loan is liquidated compensates amply for loss of taxes from the utility.

With regard to the present and proposed water sys-

tems, the record is quite clear that the existing system of your company is a source of complaint by the community, and it is a condition precedent in the loan agreement that the City "prove to the satisfaction of the State Engineer that the proposed source of water supply is suitable, both as to quantity and quality of water".

Very truly yours,

HENRY T. HUNT,
Chairman for the Administrator.

There was an inclosure with the letter of November 26 which I received from Mr. Hunt. The inclosure is a letter dated November 21, 1934, from Mr. Hunt, Chairman for the Administrator, to Mr. John Knox Coe, Mayor of Coeur d'Alene. I also find in my file an original telegram from Mr. Hunt to John P. Gray, our attorney in the litigation.

The letter from Mr. Hunt to Mr. Coe, Mayor of Couer d'Alene, dated November 21, 1934, was admitted in evidence as Post Exhibit No. 8 and is as follows:

Legal—WLG:dn docket 6695

AIR MAIL November 21, 1934.

(581) Honorable John Knox Coe,
Mayor,
Coeur D'Alene, Idaho.

Dear Mr. Mayor:
I have today sent to you the following telegram:

"REDOCKET SIXTYSIX NINETYFIVE RATE ORDINANCE REQUIRED AS CONDITION OF LOAN SHOULD FIX RATES APPROXIMATELY TWENTY PER CENT BELOW EXISTING RATES STOP AIRMAIL LETTER FOLLOWS."

The ordinance should state that the rates therein will be made available by the municipal plant and will not be increased unless and until it is proved to the

satisfaction of the Administrator that the said rates are insufficient to provide for operating expenses, necessary improvements and extensions, and so much of the debt service as is represented by the proportion which the cost of the electric system bears to the cost of the entire project. It should provide also that the charges to the City itself for street lighting and other municipal services shall not exceed the rates for such service now provided by schedules of the Washington Water Power Company until it shall be ascertained that such rates are less than the cost of service to the City. The ordidance should recite that the agreement of the City to maintain such rates and charges as aforesaid is in further consideration of the grant from the Government and is for the benefit of the electric consumers and taxpayers of the City.

It will be necessary that the ordinance be approved by the Administrator. This can be done either before or after its adoption.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator.

A copy of this letter (Exhibit No. 8) was also given me by Mr. Coe, Mayor of Coeur d'Alene.

I have here a copy of the contract between the City of Coeur d'Alene and the Public Works Administration. The contract was produced and introduced in evidence as Post Exhibit No. 10, the material parts of which are hereto attached.

CROSS EXAMINATION.

(582) By Mr. CASTERLIN:

I am not connected in any way either directly or indirectly with the Duke Power Company or the Southern Public Utilities Company. I own no stock in either of those companies nor does the Washington Water Power Company. As far as I know the Washington Water Power Company has no relation with either one of those companies.

FRANK T. POST.

These exhibits marked Post Exhibits Nos. 1 to 10 do not pertain to any litigation between the Duke Power and Southern Public Utilities Company as plaintiffs and Greenwood County and others as defendants. These Exhibits pertain to the Washington Water Power Company and the City of Coeur d'Alene and the controversy between them. That suit or controversy was entirely independent of the suit between the plaintiffs and defendants in this action in which this deposition is taken.

The first communication I received in reference to taking this deposition was subsequent to the determination of the case of the Washington Water Power Company against the City of Coeur d'Alene.

Mr. CASTERLIN: I move to strike the entire deposition of the witness Frank T. Post and all the testimony which he has given in this deposition on the grounds that it is all incompetent, immaterial and irrelevant; it does not pertain to any of the issues in the instant action; does not tend to prove or disprove any of the matters involved in the instant action and all of the testimony pertains to a collateral matter to a separate suit which has no relation directly or indirectly with the instant action. I believe that is all.

(583) PLAINTIFFS' EXHIBIT MARKED POST EXHIBIT NO. 1.

This exhibit is being transmitted to the Circuit Court of Appeals, the material parts being as follows:

"BE IT ORDAINED by the mayor and City Council of the City of Coeur d'Alene, Kootenai County, Idaho:

Section 1. That the City of Coeur d'Alene, Idaho shall issue its general obligation municipal coupon bonds in the principal amount of $300,000.00 and incur a municipal indebtedness in said amount for the purpose of acquiring by purchase or construction a light and power plant for said City, also including plant site, transmission and distribution lines and the necessary rights of way for the same."

(584) PLAINTIFFS' EXHIBIT MARKED POST EXHIBIT NO. 2.

"POSTAL TELEGRAPH

Spokane, Washington
November 7, 1934

HON. HAROLD L. ICKES,
PUBLIC WORKS ADMINISTRATOR
WASHINGTON D C

CONGRESSMAN WHITE OF IDAHO HAS RECENTLY STATED PUBLICLY THAT PUBLIC WORKS ADMINISTRATION HAS APPROVED APPLICATION CITY OF COEUR DALENE IDAHO FOR LOAN AND GRANT TO BE USED FOR CONSTRUCTION DIESEL ENGINE ELECTRIC GENERATING PLANT AND DISTRIBUTION SYSTEM IN COMPETITION WITH OUR EFFICIENT HYDRO SYSTEM STOP FEEL SURE THIS APPLICATION HAS NOT BEEN CALLED TO YOUR ATTENTION BECAUSE ITS APPROVAL WOULD VIOLATE STATEMENT OF PRINCIPLES CONTAINED IN PUBLIC WORKS ADMINISTRATION PRESS RELEASE NUMBER NINE EIGHTY NINE DATED SEPTEMBER TWENTY SEVENTH NINETEEN THIRTY FOUR STOP OUR PRESENT RATES IN COEUR DALENE ARE AMONG THE LOWEST IN THE UNITED STATES AND REGULATED BY IDAHO PUBLIC UTILITIES COMMISSION STOP APPLICATION OF THE CITY OF COEUR DALENE FOR LOAN AND GRANT WHICH WE HAD AN OPPORTUNITY TO ANSWER DOES NOT CONTAIN ANY SCHEDULE OF RATES WHICH CITY PURPOSES TO PUT IN FORCE IF PWA SHALL LOAN AND GIVE IT MONEY WITH WHICH TO BUILD A SYSTEM TO OPERATE IN COMPETITION WITH OUR COMPANY THEREIN STOP WE HAVE NEVER SEEN ANY SCHEDULE OF RATES PROPOSED BY THE CITY AND IT IS IMPOSSIBLE FOR THE CITY TO MAKE THIS PROPOSED PROJECT SELF-LIQUIDATING UNDER SCHEDULES OF RATES LOWER THAN OURS STOP CONSTRUC-

TION OF DIESEL ENGINE PLANT IN COEUR DALENE AT THIS TIME WOULD SEEM TO VIOLATE ALL THE PRINCIPLES CONTAINED IN YOUR PRESS RELEASE AND IN OTHER RELEASES OF THE PWA NOT ONLY BECAUSE OF THE SITUATION OUTLINED ABOVE BUT ALSO BECAUSE THERE IS AT THE PRESENT TIME (585) IN THIS TERRITORY A LARGE SURPLUS OF HYDRO GENERATED ELECTRICAL ENERGY WHICH WILL BE GREATLY AUGMENTED BY THE GOVERNMENT THROUGH THE GRAND COULEE DEVELOPMENT STOP FEEL SURE YOU HAVE NO INTENTION TO DEPART FROM PREVIOUSLY ANNOUNCED POLICIES AND THAT COEUR DALENE APPLICATION WILL NOT BE GRANTED STOP SHALL GREATLY APPRECIATE ASSURANCE THAT THIS SITUATION WILL BE GIVEN YOUR PERSONAL ATTENTION AND I WILL ESTEEM IT A PRIVILEGE TO HAVE THE OPPORTUNITY OF A PERSONAL INTERVIEW AND DISCUSSION OF WHOLE PROBLEM WITH YOU.

F T POST PRESIDENT
THE WASHINGTON WATER POWER COMPANY"

(586) PLAINTIFFS' EXHIBIT MARKED POST EXHIBIT NO. 4.

"SPOKANE WASHINGTON
NOVEMBER 15, 1934

HON. HAROLD L. ICKES
PUBLIC WORKS ADMINISTRATOR
WASHINGTON D C

RETEL TWELFTH DOCKET SIX SIX NINE FIVE COEUR D'ALENE IN THE COMPAIGN BEFORE THE ELECTION AUTHORIZING BOND ISSUE IT WAS NOT ASSERTED BY THE CITY OFFICIALS OR OTHER PROPONENTS THAT IF THE CITY SHOULD BE AUTHORIZED TO GO

INTO THE ELECTRIC BUSINESS THERE WOULD BE ANY LOWERING OF RATES STOP IT MAY SEEM STRANGE TO YOU BUT THE FACT IS THAT CITY OFFICIALS OF COEUR DALENE AT A MEETING WITH THE PUBLIC UTILITIES COMMISSION OF IDAHO STATED TO THAT COMMISSION IN MY PRESENCE THAT THEY WERE NOT INTERESTED IN ANY REDUCTION IN ELECTRIC RATES BUT ONLY IN MUNICIPAL OWNERSHIP STOP THE ORIGINAL PAPERS FILED BY COEUR DALENE WITH YOUR DEPARTMENT FOR A LOAN AND GRANT DID NOT CONTAIN ANY OFFER OR PROPOSAL THAT THERE WOULD FOLLOW ANY REDUCTION IN ELECTRIC RATES STOP WE WERE GIVEN A COPY OF THIS APPLICATION AND ANSWERED IT IN ACCORDANCE WITH ITS TERMS STOP SEVERAL WEEKS AFTER THE IDAHO LOCAL BOARD HAD MADE A REPORT TO WASHINGTON MISTER COE THE MAYOR OF COEUR DALENE WENT TO WASHINGTON AND HAD A CONFERENCE WITH SOMEONE UNKNOWN TO US STOP WE ARE NOT ADVISED AS TO WHAT HE SAID AND WE HAVE NO COPY OF ANY DOCUMENT OR PAPER IF ANY FILED BY HIM STOP YESTERDAY WE COMMUNICATED WITH MAYOR COE AND HE SAYS THAT HE FILED NO WRITING ON THAT SUBJECT AND THAT HE DID HAVE SOME CONVERSATION WITH SOME PARTY WHOSE NAME HE REFUSES TO GIVE US AND THAT WHAT WAS SAID ABOUT REDUCTION OF RATES HE STATES HE DOES NOT REMEMBER STOP MAYOR COE HAD NO AUTHORITY FROM THE CITY GOVERNMENTTO MAKE ANYREPRESENTATION OR PROPOSAL ON THAT SUBJECT STOP WE THINK IT IS ONLY FAIR THAT WE SHOULD HAVE A COPY OF ANY WRITING OR MEMORANDUM IF ANY (587) NOW IN THIS FILE WHICH RELATES TO ANY SUGGESTION OR PROPOSAL FOR A REDUCTION IN RATES STOP AS PERTINENT TO THIS SUBJECT WE FURTHER SUGGEST THE FOLLOWING FACTS NAMELY OF THE GROSS ELECTRIC REVENUE RECEIVED BY OUR COMPANY FROM ELECTRIC SERVICE RENDERED IN THE

STATE OF IDAHO OVER EIGHTEEN PER CENT IS PAID BACK TO THE PEOPLE IN THE FORM OF FEDERAL STATE COUNTY CITY AND OTHER TAXES STOP THE MUNICIPALISTS DO NOT PROPOSE TO PAY ANY TAXES TO THE FEDERAL GOVERNMENT NOR ANY STATE COUNTY OR SCHOOL DISTRICT TAXES OR ANY MONEYS IN LIEU THEREOF STOP WHAT THEY MAY DO IN THE MATTER OF CITY BOOKKEEPING IN THE WAY OF SHIFTING FROM ONE FUND TO ANOTHER IS PURELY A MATTER OF SPECULATION STOP THE PROPOSED MUNICIPAL PLANT DOES NOT COVER THE ENTIRE CITY BUT DELIBERATELY ADMITS NOT ONLY A PORTION THEREOF WITHIN THE CITY LIMITS BUT ALSO A PORTION THEREOF JUST OUTSIDE OF THE CITY LIMITS IN WHICH SECTIONS WE HAVE OVER THREE HUNDRED ELECTRIC CUSTOMERS STOP IN OTHER WORDS THE MUNICIPALISTS SEEK TO CORRAL THE BEST PART OF THE BUSINESS AND LEAVE THE POOREST PART TO THIS COMPANY STOP EVEN THIS PROPOSED PLANT CANNOT BE BUILT WITH THE AMOUNT OF MONEY ASKED FOR AND TO CREATE A PLANT OR A SYSTEM WHICH WOULD COVER THE ENTIRE TERRITORY WOULD MATERIALLY INCREASE THE SHORTAGE STOP THIS SECTION OF THE NORTHWEST HAS BEEN WIDELY ADVERTISED FOR ITS WATER POWER DEVELOPMENTS AND POTENTIAL DEVELOPMENTS STOP THIS COMPANY HAS SIX HYDRO PLANTS ON THE SPOKANE RIVER ONE OF THEM BEING ONLY TEN MILES FROM COEUR DALENE STOP THE FEDERAL GOVERNMENT IS SPENDING MANY MILLIONS IN DEVELOPING TWO HYDRO PLANTS IN THE COLUMBIA RIVER STOP THE CONTRACTORS FOR THE GRAND COULEE DAM WHO CERTAINLY KNOW THEIR BUSINESS HAVE BUILT A TRANSMISSION LINE FROM THE DAM SITE TO COULEE CITY AND ENTERED INTO A FIRM CONTRACT WITH THIS COMPANY FOR ALL OF THE ELECTRIC POWER NEEDED IN THAT ENTERPRISE STOP THERE CAN BE NO DOUBT THAT THESE CONTRACTORS KNEW

ALL ABOUT DIESEL ENGINE PLANTS STOP THAT UNDER THESE CIRCUMSTANCES A BUREAU OR BOARD OF THE FEDERAL GOVERNMENT SHOULD SERIOUSLY CONSIDER A PRO-
(588) POSAL TO FINANCE AND SUBSIDIZE A DIESEL ENGINE ELECTRIC SYSTEM IN COEUR DALENE IS MOST SURPRISING STOP THE RATES OF OUR COMPANY PREVAILING IN THIS SECTION ARE AMONG THE LOWEST IN THE UNITED STATES AND WERE SO DETERMINED BY INVESTIGATORS FOR THE FEDERAL TRADE COMMISSION STOP PURSUANT TO ORDER OF DEPARTMENT OF PUBLIC WORKS OF THE STATE OF WASHINGTON THIS COMPANY HAS BEEN DILIGENTLY ENGAGED FOR SEVERAL MONTHS IN MAKING A COMPLETE DETAILED INVENTORY OF ALL OF ITS PROPERTY IN THE STATES OF WASHINGTON AND IDAHO STOP THIS INVENTORY IS NOW COMPLETED AND IS BEING CHECKED BY ENGINEERS AND OTHER EMPLOYES OF SAID DEPARTMENT STOP IN THE NEAR FUTURE A TRIAL OR HEARING WILL BE HAD BEFORE SAID DEPARTMENT IN WHICH WE EXPECT THE PUBLIC UTILITIES COMMISSION OF IDAHO WILL PARTICUPATE TO DETERMINE THE FAIR VALUE OF ALL OF THE ELECTRIC PROPERTY OF THIS COMPANY AND ALSO TO DETERMINE THE REASONABLENESS OF ALL RATE SCHEDULES STOP THE RATE SCHEDULES IN EACH STATE FOR COMPARABLE CITIES TOWNS AND COMMUNITIES AND FOR AGRICULTURAL SERVICE MUST OF NECESSITY BE SUBSTANTIALLY THE SAME STOP OUR COMPANY IS CONTROLLED BY STATE LAWS AND BY ADMINISTRATIVE AND JUDICIAL BODIES CREATED BY STATE LEGISLATURES STOP THE LAW PROVIDES THAT ITS RATES SHALL BE FAIR JUST REASONABLE ADEQUATE AND NON DISCRIMINATORY AND THERE ARE SEVERE PENALTIES FOR VIOLATIONS THEREOF STOP OUR COMPANY OF COURSE CANNOT MAKE ANY BINDING CONTRACTS WHICH MIGHT ATTEMPT TO OVERRIDE OR USURP THE FUNCTIONS OF STATE REGULATORY BODIES STOP

FRANK T. POST.

WE ARE ADVISED BY OUR LAWYERS THAT THE PUBLIC WORKS ADMINISTRATOR HAS NO POWER OR AUTHORITY UNDER THE LAW TO MAKE ANY LOAN OR GRANT TO COEUR DALENE FOR THE PURPOSE OF CONSTRUCTING A DIESEL ENGINE ELECTRIC SYSTEM STOP WE MAKE THIS STATEMENT FOR THE PURPOSE OF NOT WAIVING THIS POINT IN ANY LITIGATION THAT MAY ENSUE HEREAFTER IF THERE SHOULD BE ANY SUCH LITIGATION STOP AS TO THE CONTENTION IN THE MATTER OF THE WATER SYSTEM THAT THE PROPOSED WATER IS DEEMED OF BETTER QUALITY THAN (589) THE WATER THAT IS FURNISHED BY US FROM THAT GREAT AND BEAUTIFUL LAKE WE BEG TO STATE THAT THE RECORD IN YOUR FILES WILL SHOW THAT THE PROPONENTS DO NOT KNOW WHERE THEY CAN GET THIS BETTER QUALITY OF WATER STOP THE SUGGESTION SEEMS TO BE THAT THEY MAY SINK ONE OR SEVERAL WELLS BUT HOW MANY AND WHERE AND THE QUANTITY AND QUALITY OF WATER OBTAINED THEREFROM IS PURELY SPECULATIVE STOP THE WATER FROM THE LAKE FURNISHED BY OUR COMPANY HAS BEEN HELD TO BE WHOLESOME AND POTABLE IN ACCORDANCE WITH THE STANDARDS OF THE UNITED STATES BUREAU OF HEALTH STOP PERMIT ME TO POINT OUT IN CONCLUSION THAT IF THE CITY OF COEUR DALENE SHOULD CONSTRUCT AND OPERATE THE PROPOSED SYSTEMS IN COMPETITION WITH OUR COMPANY THE INEVITABLE RESULT WILL BE THAT EACH SYSTEM WILL LOSE MONEY AND THAT THE CITY OF COEUR DALENE NOW IN A PRECARIOUS FINANCIAL SITUATION WILL BECOME BANKRUPT.

F. T. POST PRESIDENT
THE WASHINGTON WATER POWER COMPANY

FTP-W
POSTAL
CHG WWP CO''

(590) PLAINTIFFS' EXHIBIT MARKED F. T. POST EXHIBIT 10.

This Exhibit is being transmitted to the Circuit Court of Appeals, the material parts being as follows:

"Loan and Grant Agreement
between the
City of Coeur d'Alene
Kootenai County, Idaho
and the
United States of America
P. W. A. Docket No. 6695

(f) *Security*: General obligations of the Borrower payable as to both principal and interest from *ad valorem* taxes which may be levied without limit as to rate or amount upon all the taxable property within the territorial limits of the Borrower.

23. *Conditions Precedent to the Government's Obligations.* The Government shall be under no obligation to pay for any of the Bonds or to make any grant:

(i) Unless and until the Borrower shall adopt a rate and bond ordinance, satisfactory to the Administrator, in form, sufficiency and substance.

(591) EDWIN VENNARD, a witness for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

My home is Evanston, Ill. I am by profession an engineer. I am in charge of the rate department of the Middle West Service Company, in Chicago. Before I went with the Middle West Service Co. as rate expert in 1933, I was in charge of the rates of one of the operating subsidiaries. The Middle West Service Co. renders a utility service to the operating companies in which the Middle West Corporation is interested. About thirty operating companies located throughout the Middle West are serviced by our company.

Numerous applications for PWA loans and grants were made by municipalities served by the operating

companies for which I acted as rate expert. I handled such matters for the operating companies, as rates were involved. In handling the matters of these applications for PWA loans and grants, from the standpoint of the companies, I conferred with representatives of the Public Works Administration in Washington—Mr. Hunt and Mr. Rau of the Electric Power Board of Review. Mr. Rau was a rate expert and a member of the Board. I went to Washington to confer with Mr. Hunt and Mr. Rau as I saw in a press release that the Electric Power Board of Review had been formed with Mr. Hunt and Mr. Rau as members. I saw Col. Hunt or Mr. Rau at Washington on numerous occasions over a period of about a year. These meetings related exclusively to applications by municipalities for Federal loans and grants where our property was involved.

Q. Did Colonel Hunt or Mr. Rau at these conferences tell you what were the matters which would be considered by the Public Works Administration in determining whether an application for a loan and grant for an electric utility would be approved?

Mr. SCOTT: We object, because you are going into the question of authority for these people and no foundation made there and nothing binding upon this evidence.

The Court overruled the objection and admitted the evidence, to which ruling exception was taken and allowed.

The COURT: Just take this Mr. Stenographer: The argument of counsel anticipated a far wider ruling than this court has ever made. The ruling of the court is that statements made by Mr. Ickles, himself, and the statements now offered as the subject matter of testimony, being made by the Chairman of the Electric Power Board of Review, are made by such high and responsible officials, shown under the evidence to have sufficient authority to make statements about the matters now under investigation. This ruling goes this far and no further for the time being. The Court thinks in exercising a wide discretion, having before it the facts that it has about the duties of this Electric Power Board of Re-

view, and having before it the fact that they passed on this Greenwood County project and having in mind the common sense proposition that Mr. Ickes for technical matters like that had to have some responsible officials who would deal with people that came up to see him about projects, and that of necessity a board of this kind would be created. The court thinks that having all those things in consideration and exercising discrimination there about it, this testimony will be admitted.

Mr. SCOTT: Exception.

The COURT: Exception taken and allowed.

The WITNESS: Colonel Hunt and Mr. Rau did state to me the matters which would be considered by the Public Works Administration in determining whether or not an application for loan and grant would be approved.

Q. Will you please state what these members of the Electric Power Board of Review, Colonel Hunt and Mr. Rau, told you at these conferences about the matters which would be considered in determining whether an application for a loan and grant or a duplicate public utility would be approved?

Objection was made to this question on the further ground that if the Board had any authority it did not include the right of a member of the Board to discuss such matters informally when the Board was not in session.

The COURT: Did you talk over these matters (592) seriously when they made those statements? A. (The witness) Yes, sir.

The Court held that the evidence was admissible, ceptions being taken and allowed.

Q. Will you please state the substance of what was said by Colonel Hunt and Mr. Rau?

Objection by Mr. Scott and Mr. Robinson.

The COURT: The objections of Mr. Scott and Mr. Robinson taken and allowed.

Mr. DEMPSEY: Will you please give the date of the

conference and what was said, not just an indication of what was said.

There were a great many conferences with the Board over a period of a year. I would have difficulty in recalling each particular date. The first conference was in the Department of the Interior Building in 1934, only a week or so after the Board was appointed and all three members of the Board were present. The statements made to me to which I have referred were the subject of discussion at many of the conferences. Each one of the conferences dealt with applications for loans and grants by municipalities served by our companies.

The substance of what the Board told me was that rates would be considered and be an important factor in determining whether or not the grants and loans would be approved. That the process would require that Mr. Rau, the rate expert, would determine the lowest rate under which the municipal plant could operate and make operating expenses and make interest. The utility company would be given the opportunity of making a rate at least equal to or lower than the rate of the municipal plant. If we should make a rate equal to or lower than the municipal rate, the project would lack social desirability and would not be approved. When I say "we" I mean I was told as representing the utilities.

Mr. SHER: I should like to make the statement that the government still objects to this entire line of testimony.

The COURT: That is thoroughly understood. All the testimony is taken subject to the objection by all the defendants and all this testimony is inadmissible you contend, and I am overruling that and you have objected and the exception is allowed.

Mr. SHER: It will not be necessary to object to each question?

The COURT: No.

I was told that rates generally were too high and should be reduced. We had to give assurance to the Board that our rate, equal to or lower than the rate the municipality could charge, was actually put into effect. As to the possibility of the municipality reducing its proposed rates we were told that if the municipality came

back with rates lower than our new low rates, the project would be re-opened and reconsidered and we would then be given the opportunity to lower our rates some more. They said in case we did not do that the social desirability (593) of the project would remain. About twenty-five projects distributed through about ten states in the middle west were involved in these conferences which I had with the Electric Power Board of Review. Some of the projects involved general obligation bonds. Colonel Hunt and Mr. Rau told me there would be no difference in the matters which would be considered by the Public Works Administration in passing upon an application for a loan and grant whether it was based upon general obligation bonds or revenue bonds. In either case the rates would be determined at the lowest point under which the municipal plant could operate and we would be given the opportunity of making a lower rate.

I am familiar with the signature of Col. Hunt. The letters shown me marked for identification plaintiffs' exhibits 50 to 53, inclusive, and 55 to 58, inclusive, are original letters which I received in due course of mail. They are signed by Col. Hunt, Chairman of the Electric Power Board of Review. They relate to the projects about which I was dealing with the Board. I was representing the utilities operating in the various municipalities where the applications for loans and grants, referred to in the letters, were made.

The two telegrams shown me, marked plaintiffs' exhibits 54 and 59 for identification, were received by me from Col. Hunt. They are the original telegrams delivered to me by the Telegraph Company. They also relate to applications for loans and grants by municipalities about which, I, as representative of the utility companies, was dealing with the Electric Power Board of Review.

Mr. Scott: If your Honor please, let these records show the defendants, at least the government's defendant, Mr. Ickes, separately objects to each of the exhibits or instruments offered for the reasons we have previously stated.

The Court: All right.

Mr. D. W. Robinson, Jr: We understand our objection is in.

The Court: I think they are admissible, gentlemen.

I haven't read each in detail, but I have glanced at them. They all deal with the projects. They are admissible if for no other reason than in reply—I have been reading Mr. Ickes' testimony and all of them are signed "Henry T. Hunt, Chairman for the Administrator", and I know and you know and everybody else knows that Mr. Ickes couldn't focus his attention on the details of every one of these projects for which application was made, and if the government found it necessary to have an advisory board to act for him, that is mighty strong evidence that the assistance was so necessary that in order to get at the truth of the matter, we have got to have their transactions under investigation here in this court.

Mr. SCOTT: Let us have a separate exception and objection to each.

The COURT: *Eceptions* taken and allowed by each defendant to the introduction of each and every one of these exhibits.

The letters and telegrams identified by the witness were admitted in evidence as plaintiffs' exhibits 50 to 59, inclusive:

(594) Plaintiffs' Exhibit 50 is as follows:

"FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
August 21, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Company,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

With regard to Docket 3571, application of the Light and Power Improvement District No. 1, Rector, Arkansas:

This project is before the Electric Power Board of Review and presents a situation substantially similar to that in Trenton and Kennett, Missouri.

If the Arkansas-Missouri Power Company is willing to provide a rate more advantageous to the District than cost of current to be furnished by the proposed plant the latter would be without social desirability. Examination here of the project shows that assuming the municipal plant will secure 64% of the competitive load, all of the City's business, and serve four adjacent cotton gins, a total of approximately 232,000 k. w. h at an average rate of 5.3¢, the project would be self-liquidating. Information is desired as to whether your Company is willing to put in effect the rate necessary to meet the proposed competition.

It appears that about April 25 the Commissioners of the Light and Power Improvement District, Messrs. Sneed, Abney and Bearden, conferred with James Hill, Jr., President of the Arkansas-Missouri Power Company and H. O. Ponder, the Attorney of the Company, on the subject of the purchase of the Company's distribution system by the District. The Company's representative stated that it would be impossible to sell the distribution system as it was incumbered by bonds covering that and other property.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator."

Plaintiffs' Exhibit No. 51 is as follows:

"FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
October 30, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Company,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

In reply to your letter of October 26 relative to the (595) Dowagiac, Michigan, electric project, Docket No. 5995:

Mr. Rau determined that the rates which you proposed to offer Dowagiac, set forth in your supplementary protest, are as low as those which the proposed municipal plant could effect. By letter dated October 22 I so advised Mayor Howell and suggested that the City withdraw its application as soon as it was clear that the rates would be made available. In reply to a subsequent communication I advised him also that if it appeared that the Michigan Gas and Electric Company was unwilling or unable to put the proposed rates into effect we would of course consider the Project without regard to the Company's offer. I believe that the proper course for the Company is to take prompt steps to put the proposed rates into effect.

Very truly yours,
HENRY T. HUNT,
Chairman,
For the Administrator.

Plaintiffs' Exhibit No. 52 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
August 22, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

This Board has before it the application of the City of Washington, Kansas (Docket 5264) for a loan and grant in the amount of $92,866 to finance the construction of a Diesel engine generating plant, 375 k. w. capacity, and a distribution system for 573 consumers, including street lighting system for 55 street lights.

It appears that the City of Washington is now served by the Kansas Power Company, one of the sub-

sidiaries of the Middle West. The applicant proposes a reduction of 15% from the rates filed by the Kansas Power Company as of March 10, 1930. It is understood that your Company has either placed in effect or proposes a reduction in the said rates. In order that this Board may determine whether or not the project is socially desirable, you are requested to inform us what revision in rates you propose for Washington and when such rates will be put in effect.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator.

Plaintiffs' Exhibit No. 53 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

(596) ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
August 27, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Co.,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

With regard to Kennett, Missouri, Docket No. 2427, and projects of other Missouri cities served by the Arkansas-Missouri Power Company, one of your subsidiaries:

I think you should furnish this Board with a certified copy of the order of the Missouri Public Service Commission approving the rate reduction effective September 1 in order that this Board may have formal evidence of that approval. As I understand the situation, the order applies to several of the other cities served by the Com-

pany as well as to Kennett. If there are separate orders I should like to have copies of each order.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administration.

Plaintiffs' Exhibit No. 54 is as follows:

POSTAL TELEGRAPH

456 31 GOVT 6 EXTRA

G WASHINGTON DC 4 621P

EDWIN VENNARD
CARE MIDDLE WEST UTILITIES CO TWENTY NORTH WACKER DRIVE CHGO RE DOCKET EIGHTY SEVEN THIRTY FIVE SEND NINETEEN THIRTY THREE CLASSIFIED SALES REVENUES CUSTOMERS ALSO PRESENT RATES CENTRAL ILLINOIS PUBLIC SERVICE COMPANY IN PETERSBURG ILLINOIS.

H. T. HUNT,
Chairman Electric Power Board Review
for the Administrator.

Plaintiffs' Exhibit No. 55 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
November 26, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Company,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

In your letter of October 6 regarding the Concordia,

Missouri, electric project, Docket No. 2718, you state that the Missouri Public Service Company "has offered the City further reductions in street lighting service amounting to 22% and reduction in rate for municipal water pumping of approximately 47%". I assume that (597) the offer or offers referred to were recently made. Would you be good enough to advise me fully regarding such offers, especially as to the dates on which they were made, the city officials to whom they were addressed, and the exact rates offered.

Very truly yours,

(Signed) HENRY T. HUNT,
HENRY T. HUNT,
Chairman,
For the Administrator.

Plaintiffs' Exhibit No. 56 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
August 27, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Co.,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

With reference to Stigler, Oklahoma, Docket 7472:

This project is one for the financing of a municipal electric system, including a generating plant.

In determining upon its recommendation this Board would be aided by a statement from the Middle West Utilities Company stating what revisions in rates are contemplated in Stigler and what date such revised rates will become effective.

Very truly yours,
(signed) HENRY T. HUNT,
HENRY T. HUNT,
Chairman for the Administrator.

Plaintiffs' Exhibit No. 57 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
October 12, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Company,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

In reply to your letter of October 6 regarding the Middlesboro, Kentucky, electric project, Docket No. 309:

Mr. Rau has examined the supplementary information submitted by you showing the various rate (598) changes made in Middlesboro and has concluded that the existing rates are not sufficiently low to require reconsideration of the project.

Very truly yours,

(Signed) HENRY T. HUNT,
HENRY T. HUNT,
Chairman,
For the Administrator.

Plaintiffs' Exhibit No. 58 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
November 14, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Company,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

In reply to your letter of November 7 relative to the San Angelo, Texas, electric project, Docket No. 6756:

So long as your proposed new rates are know only to you and to the Mayor of San Angelo, it will be impossible to consider them in our study of the project. I suggest that you send me a copy of the proposed new rate schedule and that you send a copy also to Mr. E. E. Lowrie, City Manager of San Angelo, who has been in communication with this Board regarding the application.

Very truly yours,

(Signed) HENRY T. HUNT,
HENRY T. HUNT,
Chairman,
For the Administrator.

Plaintiffs' Exhibit No. 59 is as follows:

POSTAL TELEGRAPH

The International System

Received at	Commercial	All America
Hearst Bldg.	Cables	Cables
Room 721		
State 6734	Mackay Radio	

AB 190 23 4 EXTRA GOVT UX-G
WASHINGTON DC 408 P

Nov. 30 1934

EDWIN VENNARD. CARE MIDDLE WEST UTILITIES 20 NORTH WACKER DR.

HAS YOUR SUBSIDIARY PLACED IN EFFECT REDUCED RATES IN SAN ANGELO TEXAS CITY MANAGER SAYS NO REDUCTION HAS BEEN MADE.

H. T. HUNT,
Chairman Electric Power Board of Review for the Administrator. 329P.

CROSS EXAMINATION.

(599) By Mr. SCOTT on behalf of Harold L. Ickes:

Mr. SCOTT: Before proceeding to cross examine this witness we would like the record to show we do so without waiving any of our rights on the objections made heretofore on his direct examination.

The COURT: Oh, certainly.

I came to Washington as representative of certain utilities to discuss the question of rates with the Power Board. I don't know who made the first suggestion that I go for conferences with the Board. I went of my own accord. I was representing the companies that would be damaged by these loans and grants. I went because I was handling these matters for those companies. I was naturally opposed to the loans and grants because they would result in the destruction of property I represented. I went to Washington to determine if there was some way we could avoid having the loans and grants approved; to determine if by lowering rates we could cause the projects to be not approved.

At the first meeting we had quite a general discussion of policy and rates. As to who first said the word "rate", I am not able to say, but the substance of that conference was that if we could reduce our rates, we would be given an opportunity to reduce them below the municipal rate which would destroy the desirability of the project. I went to Washington to see if rate reduction would forestall the approval of the projects.

I have said at the first conference there was a general discussion.

Q. Mr. Hunt didn't make such a suggestion, did he? A. Later on yes and possibly the first meeting, yes. As to who said it first I can't say.

I point out that we had in mind rate reductions here and there during the year. When the subject of rates was brought up I was told we would be given the opportunity to reduce our rates below the municipal rates. I went down there first to see what the municipal

rates were, to determine if we could possibly meet those rates. Mr. Hunt didn't mention rates as much as Rau. I cannot say whether any particular schedule of rates for us to adopt was suggested at the first meeting but there was at the second. I can name a number of communities for which Mr. Rau suggested rate schedules. In Dowagiac, Mich., for example, he determined the lowest rate under which the municipal plant could operate and I was told if we made a rate equal to that or less, there (600) would be no social desirability of the municipal project and it would not be approved. We made such a rate and the project was not approved.

The question of a project being self-liquidating and the question of social desirability were separate and distinct questions. The question of social desirability was whether or not the rate of the municipal plant was lower than ours or ours lower than theirs. That was the test—the cheapest rate to the customer. That was not my idea. Social desirability was their term.

If we made a rate lower than the rate under which the plant could be operated, that destroyed the social desirability. Likewise if the municipal plant proposed a rate higher than ours it would not be considered because there was no social desirability to be gained.

In the case of Dowagiac the city proposed a rate lower than our present rate and Mr. Rau determined that the city could operate under that municipal rate, and we were given an opportunity to make a rate equal to or lower than that, and we did so, and the project was not approved. There is now outstanding an allotment for that project; and it is restrained in the courts at the instance of one of the companies I represented. The project was not approved by the Electric Power Board of Review when we put in our rates which were lower than the rates Mr. Rau determined that this plant could operate under. The City was notified by Mr. Hunt that our rates were reasonable.

Mr. Hunt also asked us to give evidence that the rate was formally put into effect. We gave that evidence by a copy of a letter we wrote the City of Dowagiac, formally putting these lower rates into effect.

The Electric Power Board of Review did not approve that project. Somebody later on approved it. The Board had authority to disapprove it, and it did in the case of Dowagiac. They wrote the City of

Dowagiac to withdraw their application owing to our (601) lower rates. I have read that an allotment for Dowagiac was approved later.

CROSS EXAMINATION.

Mr. D. W. ROBINSON, JR.: May I on behalf of Greenwood County ask the witness a few questions reserving my rights?

The COURT: Yes, sir.

The term "social desirability" was used in our conversations as referring to cheap electricity. Yes, it referred to cheap electricity in the area which the application covered, but they spoke of social desirability also in the broad sense of lower electric rates everywhere in order that people could use more electricity and get the benefit of electricity. The use of the terms in our conversations was with regard to applications in different localities. In every case it came down to a comparison of the rates in the particular community.

On my first visit to Washington I talked to all three members of the Board together, but on my subsequent visits I didn't ever talk with all three of them together. I didn't talk to Mr. Cooke again on these matters. Sometimes my conversation would be with Col. Hunt; sometimes with Mr. Rau, and sometimes with both together.

The witness having been recalled testified as follows:

DIRECT EXAMINATION.

In the case of the City of Dowagiac, after we reduced our rate down to the city's rate and the project was disapproved, Mr. Hunt notified me that the city had again made a lower rate than our new low rate. The city actually made that rate in a new application. Then the project was approved. We were asked if we cared to reduce or could reduce our rate down to the new low rate of the city. We informed Mr. Hunt that we could not reduce our rate any further.

(602) MR. D. E. BYERLEY, a witness for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I reside in Adrian, Mich. I am President and General Manager of the Citizens Light & Power Company and have been for thirteen years. The Town of Tecumseh, Mich., is served by our company. It made an application to the Public Works Administration for a loan and grant for the purpose of constructing a municipal electric utility. I represented our Company in connection with the application. In that connection I wrote to the Public Works Administration and received a reply. The letter you show me, marked Plaintiffs' Exhibit 60 for identification, is the original letter I refer to and was received in the due course of the mail.

The letter was offered in evidence by plaintiffs.

Counsel for all of the defendants objected to the admission of the letter, on the ground that it related to a contract and to transactions not involved in this case. (Similar objections were made by counsel for defendants to the testimony of the witnesses, Post and Vennard, and to the letters and telegrams introduced as a part of the testimony of these witnesses. Each of the objections were overruled by the Court, and to each ruling defendants took an exception which was allowed by the Court.)

The COURT: The objection is on the same ground that has been previously argued. Court overrules objection. Exception taken and allowed. The Court thinks the evidence is admissible for three reasons, to sum them all up. In the first place, they are a reply to the testimony of Mr. Ickes which is already in the case? In the second place, they are admissible on the ground that they show the interpretation of similar contracts by the parties charged, as far as the PWA is concerned, with entering (603) into and controlling those contracts, and they tend to help this Court determine what would be in the opinion of the people entering into the contract, the natural, normal result of this particular contract here.

There is the objection which is not only technical but has some merit in it, as to whether or not the Electric

Power Board of Review has authority to speak, so that its statement would be in reply to Mr. Ickes' individual testimony. Well, that is a point not without some difficulty, but every one of these letters is signed "Chairman for the Administrator", so he assumed to act, and the fact that a Board like that acted for a man, under his control, over a long period of time certainly suggests that the only reasonable conclusion in the world is Mr. Ickes knew the Board was so acting and therefore we have the element of ratification of agency. Furthermore than that, I think under the common sense view of them they had power to speak for themselves, because they were instructed in these matters. I think the testimony is admissible.

Mr. DEMPSEY, Counsel for Defendants: May we have noted our exception to that ruling of Your Honor? We move to strike out the testimony. The contracts in each of these cases may or may not be material, but certainly negotiations leading up to those contracts can't be material on any basis as showing what rights the public would acquire under the contract.

The COURT: Oh, the details of the contracts are necessarily different, but all of them are contracts where the government was going to lend money to build a municipal plant that would operate in competition with a privately owned plant, and that is the kind of situation involved in this case, and therefore so far as the main elements are concerned they are similar.

(604) Mr. DEMPSEY: If Your Honor please, the contracts, not the negotiations leading up to them, show what the rights are under them.

The COURT: Of course, but we are not trying a case on those contracts, but I am admitting statements against interest which were had in those negotiations leading up to the contract. I think they are admissible.

The letter was admitted in evidence as Plaintiffs' Exhibit 60, and is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
August 22, 1934.

Mr. D. E. Byerley,
Vice-President and General Manager,
Lenawee County Light & Power Co.,
Adrain, Michigan.

Dear Sir:

Your letter of August 13 to Colonel Waite with reference to the Tecumseh, Michigan, electric power project, Docket 7307, has been referred to me for reply.

This project is now before this Board for recommendation.

I note the opinion of counsel to the effect that your Company has a perpetual franchise in Tecemseh. There is, however, no claim that it has an exclusive franchise.

The process in PWA is to examine into the question of engineering soundness, reasonable security and social desirability. The last factor depends upon whether or not the municipal project will provide current at rates substantially less than those at which it is provided by the existing utility. Hence this Board in all such cases is aided by information as to existing rates and what pros- (605) pect there is of rate reduction. In fact it has been its policy to afford the existing utility an opportunity to offer to place in effect such a rate reduction as will meet the proposed rates of the municipality. If you wish to make any statement on this subject the Board would be glad to receive and consider it. The matter of a hearing can wait until we receive the information suggested.

Very truly yours,

HENRY T. HUNT, (Signed)
HENRY T. HUNT,
Chairman,
For the Administrator.

After I received that letter from Colonel Hunt, dated August 22, 1934, I went to Washington for the purpose of

discussing with Col. Hunt on the basis of that letter, the application of Morenci, Mich., for a loan and grant for an electric utility. My Company also served the Town of Morenci. In line with what Col. Hunt said in his letter about rates I took information with me to show that in the case of Morenci our rates were the same or lower than the ones proposed in the engineers' estimate on which the application was made to the PWA Board. I showed that the average revenue which we got per kilowatt hour was the same as the average revenue which they estimated for the first year, and that it was within 1/100¢ of what they estimated for the fifteen years, in the hope of convincing Mr. Hunt that the Morenci project should not be allowed. Mr. Hunt told me they figured the village of Morenci could sell current 15% less than the rates this engineer had set up in his estimate filed with the application.

I asked Mr. Hunt if that meant we would have to reduce our rates 15% and he said yes. I asked him if we (606) did not do it what would happen and he said the project would be approved.

The COURT: Let me understand one thing from counsel for plaintiffs. Of course counsel for Mr. Ickes probably has knowledge of all of these matters, but Greenwood County is in a little different situation. While the County is associated in this suit with the Administrator it had no way of knowing in advance of this trial what witnesses the plaintiffs were going to bring here.

Mr. ROBINSON, Counsel for Plaintiffs: Counsel for Greenwood County were given a copy of this particular letter, and certainly a copy of some of Mr. Vennard's letters.

The COURT: The point I am getting at is, if you have any further witnesses along this line, I think in fairness to Greenwood County and to the Court you might let us know.

Mr. ROBINSON: I should be very glad to do so. The only other witness we have along this line is Colonel Carter, who represents the Texas Utility Company, and the gentlemen on the other side were asked to produce the correspondence with him. In addition we have requested them to produce copies of letters which were written to a utility company in Florida, and also other papers which we propose to introduce.

Mr. DEMPSEY, Counsel for Defendants: We never heard of Morenci, Mich., until today, and we may find it necessary to communicate and find out what the facts were on this particular project, in order that Your Honor may have the facts. And may we have the same right with Mr. Byerley to cross examine him later this afternoon and not at this time, in order to find out more about these two projects?

The COURT: Certainly.

Defendants later announced that they had no cross examination for the witness Byerley.

(607) GEORGE H. CARTER, a witness for the plaintiffs, having been duly sworn, testified as follows:

I reside at Marlin, Texas, and am an attorney at law. I am attorney for the Central Division of the Texas Utilities Company and a Director in the Company and the Vice-President. The Towns of Marlin and Plainview, Texas, are served by the Texas Utilities Company. They made application to PWA for loans and grants for the construction of municipal electric utilities. I had charge of the protest against the Marlin application but did not have anything to do with the protest with reference to the Plainview application originally, although subsequently I did come to represent the company, with attorneys for the Plains Division in which Plainview is located, in connection with those matters. Plainview is 450 miles west of Marlin where I reside.

I received a telegram dated August 18, 1934, in the regular course of business from Colonel Hunt, Chairman of the Electric Power Board of Review.

The telegram referred to was marked Plaintiffs' Exhibit 61 for identification, and was offered in evidence by plaintiffs.

Mr. DEMPSEY, Counsel for Defendants: Enter our same objection if Your Honor please.

The COURT: I have just read Judge Parker's opinion. I don't see how the plaintiffs could try this case without testimony along this line. The objection is overruled and the defendants allowed an exception.

The telegram, Plaintiffs' Exhibit 61, was admitted in evidence and reads as follows:

POSTAL TELEGRAPH

D69 48 GOVT 4 EXTRA—G

WASHINGTON DC 18 136P

BARTLETT CARTER AND RICE ATTORNEYS
MARLIN TEX 1934 Aug 18 PM 2 04

(608) REFERENCE PROJECT MARLIN ELECTRIC SYSTEM SUGGEST YOU INFORM CLIENT THIS BOARD WISHES ASCERTAIN WHETHER COMPANY WILL PLACE IN EFFECT RATES LESS THAN THOSE OFFERED BY MUNICIPALITY STOP POSSIBLY ITS REPRESENTATIVE WILL CALL ON ME HERE PROMPTLY IN ORDER THAT THIS MATTER MAY BE DETERMINED.

H. T. HUNT,
Chairman Electric Power Board of Review
For the Administrator.

Before receiving that telegram I had had no communication with Colonel Hunt. I had not written him or telegraphed him.

In response to that telegram I went at once to Washington. I made an appointment on August 22 with the Electric Power Board of Review.

I first called on Mr. Hunt and discussed the matter with him. He referred me to Mr. Otto Rau, whom he told me was a member of the Board and the rate expert for the Board. I then went to talk with Mr. Rau. I attempted to go into the economic features with Mr. Rau and explained to him that we had a number of small towns and communities and served a number of farmers, with the total population of approximately thirty thousand people spread over an area 105 miles long, with small gross. If the gross from one of our towns was lost it would hamper us materially in serving all of these small communities and farmers at the same rate as we did. Mr. Rau told me that the regulations were so framed that they must consider alone, the application of the town presenting the application, and not consider the advantages or disadvantages economically of other towns connected with the system. He told me the only matter with

which they were concerned was the matter of rates and that unless we would reduce our rates to those offered by the city the application would be granted. He stated that (609) in its application the city had offered to serve the people at 15% lower than the rates then in effect by the company.

I explained to him that I had no authority to make rates, that I would immediately communicate with my clients and the executives of the company who did have authority, and would report to him just as soon as I could.

The telegram shown me, marked Plaintiffs' Exhibit 62 for identification, was received by me in the regular course of business.

Mr. DEMPSEY: We offer the same objection to this telegram.

The telegram was admitted in evidence as Plaintiffs' Exhibit 62, and reads as follows:

WESTERN UNION

6D D 11 GOVT NM 1 EXTRA

WUX FORT SAM HOUSTON TEX AUG 28 1934

GEORGE H. CARTER
ATTORNEY AT LAW MARLIN TEX

RE MARLIN PROJECT CANNOT CONSIDER REVISED RATES UNLESS SUBMITTED PROMPTLY

HENRY T. HUNT
WASHINGTON
820A 29

I sent Col. Hunt the telegram dated March 29, 1934, marked Plaintiffs' Exhibit 63, for identification.

This telegram was admitted in evidence as Plaintiffs' Exhibit 63, and reads as follows:

WESTERN UNION

Marlin, Texas, August 29, 1934.

(610) Mr. Henry T. Hunt, Chairman,
Electric Power Board of Review,
Room 5139, Interior Building,
Washington, D. C.

REWIRE ACTIVELY WORKING WILL ADVISE IN NEXT FEW DAYS.

GEO. H. CARTER.

I received from Col. Hunt the telegram, dated October 2, 1934, marked Plaintiffs' Exhibit 64, for identification.

This telegram was admitted in evidence as Plaintiffs' Exhibit 64, and reads as follows:

POSTAL TELEGRAPH

D131 32 GOVT 7 EXTRA XU—G
WASHINGTON DC 2 623P

1934 OCT 2 PM 6 14

GEORGE H. CARTER
MARLIN TEXAS

WHEN WILL WE RECEIVE RATE SCHEDULES FOR MARLIN STOP NECESSARY SAME BE SUBMITTED PROMPTLY OTHERWISE MUST PROCEED WITH ACTION ON DOCKET SIXTY EIGHT EIGHTY FIVE.

H. T. HUNT,
Chairman Electric Power Board of Review
For the Administrator.

I sent Col. Hunt the telegram dated October 6, 1934, marked Plaintiffs' Exhibit 65, for identification.

This telegram was introduced in evidence as Plaintiffs' Exhibit 65, and reads as follows:

WESTERN UNION

Marlin, Texas, October 6, 1934.

Col. H. T. Hunt, Chairman,
Electric Power Board of Review,
Interior Building,
Washington, D. C.

ON RETURNING TO MY OFFICE FOUR O'CLOCK SATURDAY AFTERNOON OCTOBER SIXTH AFTER A WEEK'S ABSENCE I FOUND (611) YOUR TELEGRAM OF OCTOBER SECOND PERIOD THROUGH SOME OVERSIGHT IT WAS NOT RELAYED TO ME PERIOD I WILL GIVE YOU THE INFORMATION REQUESTED ON TUESDAY OCTOBER NINTH.

GEO. H. CARTER.

I also sent Col. Hunt the telegram, dated October 9, 1934, marked Plaintiffs' Exhibit 66, for identification.

This telegram was admitted in evidence as Plaintiffs' Exhibit 66, and reads as follows:

WESTERN UNION

Marlin, Texas, October 9, 1934.

Col. Henry T. Hunt, Chairman,
Electric Power Board of Review,
Interior Building,
Washington, D. C.

TEXAS UTILITIES COMPANY WILL SHORTLY ANNOUNCE ONE CENT REDUCTION IN FIRST STEP OF DOMESTIC RATES INCLUDING ALL SMALL TOWNS AND RURAL CUSTOMERS AS WELL AS MARLIN.

GEO. H. CARTER.

Plaintiffs' Exhibits 62 and 64 are telegrams received by me from Col. Hunt in the regular course of business.

Plaintiffs' Exhibits 63, 65 and 66 are copies of telegrams which I sent Col. Hunt. They are copies retained in my files of the original telegrams delivered to the Telegraph Company.

Plaintiffs' Exhibits 63, 65 and 66, being telegrams from Col. Carter to Col. Hunt, were introduced as connecting links in the correspondence, but not for any probative value as to any of the facts therein stated.

After this exchange of telegrams I went to Washington to confer with representatives of the Public Works Administration in January, 1935. I saw Major Fleming in the Interior Building and asked him to give us a hearing on both the Plainview and Marlin protests. He (612) arranged a hearing before the Electric Power Board of Review on March 1, 1935. The hearing was held on that date and I was present. There were several other gentlemen representing the Texas Utilities Company present. Mr. Otto Rau of the Electric Power Board of Review was present and held the hearing himself.

We took up the Marlin application first. Mr. Veach, representing the Company, went through the survey that he had made with reference to Marlin. I then went through the supplemental protest that I had filed with reference to Marlin. I noticed that Mr. Rau made no comments, and I finally asked him if he was interested in the part of the protest I was presenting. He stated that he was interested, but that it was not a matter of concern, that the only matter he was interested in was the matter of rates; whether we would lower our rates. After noon we went into the Plainview matter. We had Mr. Veach go rather hurriedly through his report with reference to Plainview. Mr. Crenshaw then made a brief resume of the protest that he had filed for Plainview, and then we got as rapidly as we could to a rate that had been worked out and had just been submitted to the City Council at Plainview. Mr. Rau's attitude at once changed, as soon as we went into the matter of rates. He at once became interested. Mr. Allen, the General Superintendent for the Plains Division, presented the rate. Mr. Rau followed it very closely and stated, "That is the kind of rate that we are looking for". He said, "We want to be assured that that rate is in force". We assured him that it would be placed in force at once in Plainview and Marlin and he asked us then some questions about the rate, what provisions we had made in

this rate for taking care of our revenue, because he said, "There will be a slump, necessarily, in your revenue, between the time of the installation of that rate and the time your customers increase their consumption of (613) electricity under it". Mr. Allen then explained the method that we had adopted in connection with it, of "freezing" the revenues, so as to bridge over the gap. Mr. Rau stated that we were entitled to do that, because it was necessary for us to collect revenues to take care of the overhead or running expenses. The hearing closed with the understanding that we would at once file letters with the Electric Power Board of review, installing those rates in Marlin and Plainview. Mr. Rau stated to us that he would write a letter to the Mayor of Marlin and to the Mayor of Plainview, telling them that their projects could not pay out in competition with that rate. He stated that if the applications were not withdrawn they would be disapproved. I don't know whether the Town of Plainview subsequently filed any new application or different schedule of rates. Plainview is in west Texas and I live in central Texas.

Immediately on the close of the hearing I reported the action to Major Fleming. He was Assistant Administrator under Mr. Ickes. I knew him then only as one high up in authority in the organization. I have since learned that he was Deputy Administrator. I told Mr. Fleming that we were elated to have gotten that trouble behind us so as to preserve our property. He stated that the Department was willing to cooperate with those companies that lowered their rates.

Cross Examination.

I testified as a witness in the District Court of the District of Columbia in the case of *Texas Power Company* vs. *Ickes and others*, about a year ago. In the course of my testimony I said: "We went to Mr. Rau a few days later, it may have been the Friday following March first, and we told Mr. Rau that the Texas Utilities Company would immediately install the same rate that (614) he had approved, in all of the towns served by the Plains group and the Central group of the Texas Utilities, if the Electric Power Board of Review would agree to refuse to receive any further applications from any towns served by our company in those two areas. Mr.

Rau said it would be impossible to make that agreement, because 'We are bound to accept and consider every application filed before the Board, but I am assuming that at no time none of your towns or none of the towns served by you can make a better showing than that made by Marlin and Plainview, in which case, while the applications will be considered, they will take the same course and would likewise be rejected for the same reasons that they cannot pay out'." That is a correct statement of my testimony and of the conversation that took place with Mr. Rau a few days after the first of March.

I understand that after the protest was filed with respect to Plainview and after we had those discussions with Mr. Rau, the Plainview application for a loan and grant for a municipal power project in competition with the Texas Utilities Company was allowed and that a loan and grant agreement was entered into between the City and the Government. As a result of that loan and grant a suit was brought in the District of Columbia and was tried before Judge Wheat. It is my understanding, all secondhand, that after he decided the case and while it was pending on appeal, the Texas Utilities Company had negotiations with the City in an attempt to work out the differences between them. As a result of those negotiations the Utilities Company and the City did agree upon a rate that was satisfactory to the City and the suit was dismissed. I do not think any representative of the Public Works Administration had any part in the negotiations between the Company and the City. You understand, as I said, I was 450 miles away and had no part in those negotiations. It was my general understanding that they were held between the Texas Utilities Company and the representatives of the City and that (615) the case tried before Judge Wheat was dismissed.

Before I came to Washington to talk to Mr. Hunt the first time, I wired Senator Sheppard of Texas to arrange a conference for me with the Board. I wired Senator Sheppard immediately upon receipt of Col. Hunt's first telegram on August 18th.

The COURT: Let me get that straight. Do you mean that you got the telegram before you even went to Washington.

The WITNESS: Yes, sir.

The COURT: You hadn't been up to talk to them at all?

The WITNESS: No, sir, I didn't know anything about the Electric Power Board of Review, or know that there was one for that matter. The protest was filed before the Advisory Board of Texas, located at Fort Worth.

The COURT: So the officers in Washington had some previous notice that your company was protesting?

The WITNESS: I assume so Your Honor. I went to Fort Worth to file the protest in December, 1933. I argued the protest before the Advisory Board and then went back home. I heard nothing more and didn't know what had become of it. The next thing I heard was on August 18, 1934, when I received this telegram from Col. Henry T. Hunt.

The cross examination by counsel for defendants continued: The allotment for Plainview was approved some time after the 1st of March, 1935. I had to go to Miami, Fla., to try a case and heard of it while I was down there.

RE-DIRECT EXAMINATION.

Q. Well, Col. Carter, do you know whether the City of Plainview made any further reductions in rates after March 1, 1935?

(616) COUNSEL FOR DEFENDANTS: I think the witness has already testified he doesn't know.

COUNSEL FOR PLAINTIFFS: If he has, all right, I just wanted to be sure of that. To the witness: He says you have covered it Colonel so that is all.

(617) Plaintiffs offered, and the court admitted, in evidence as Plaintiffs' Exhibits 67 to 73, inclusive, the following letters, the originals or copies of which were produced by the defendant, Harold L. Ickes, in response to an order of the court to produce the same.

To the admission of these letters in evidence the defendants objected on the ground of irrelevancy, the authenticity of the letters being admitted. The objection was overruled by the court and an exception was taken by defendants and allowed by the court.

PLAINTIFFS' EXHIBIT NO. 67 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW.

Washington, D. C.
August 27, 1934.

Mr, T. O. Kennedy,
Vice-President and General Manager,
The Ohio Public Service Company,
Hanna Building,
Cleveland, Ohio.

Dear Sir:

In reply to your letter of August 14 regarding the Sandusky, Ohio, electric power project, Docket No. 7004:

You state that the offer by the Ohio Public Service Company to the City of Sandusky of a rate contract embodying exactly the rates proposed by the City for its municipal plant, is still open. It is noted also that in May, 1933, the Company submitted for approval by the City Commission a minimum rate of 5¢ a day including 10 kwh per month, with a rate of 3¢ per kwh for the next 290 kwh per month and of 2¢ per kwh for anything in excess of 300 kwh per month.

After careful study of the project, the Electric Power Board of Review inclines to the opinion that if the offer of rates identical with the proposed municipal rates is supplemented by an optional rate based upon (618) the May, 1933, offer, said optional rate to be available to all consumers using more than 40 kwh per month, the project will be without social value and the application should be denied.

Would you be good enough to let me know whether the Company is prepared to make such an offer to the City, and to send me copies of any communications with the city relevant thereto.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Adminisfrator.

PLAINTIFFS' EXHIBIT NO. 68 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW.

Washington, D. C.
September 18, 1934.

Mr. T. O. Kennedy,
Vice-President and General Manager,
The Ohio Public Service Company,
Hanna Building,
Cleveland, Ohio.

Dear Mr. KeKnnedy:

In reply to your letter of September 4 with regard to the Sandusky, Ohio, electric power project, Docket No. 7004:

I attach a copy of letter I have written the City Manager on this subject. I should be glad to be informed of the progress of events from your standpoint.

One of the difficulties in this and like situations is to convince the municipality that the reduction of rates is not merely a temporary expedient whereby the opportunity to finance the municipal project through this Administration may be lost and with the intention on (619) the part of the competing utility to raise its rates when that opportunity no longer exists. In this connection a brief from your counsel showing what action by the Public Service Commission of Ohio is necessary to enable your Company to increase its rates would be helpful. I think that such a brief should also be submitted to the city authorities of Sandusky. My own view is that your offer is an admission that the rates proposed would earn a fair return on your propery used and useful in connection with the service to Sandusky consumers and that the acceptance of such rates will not only constitute a contract with the city but would amount to an estoppel in the absence of later changes in economic conditions which would justify the Commission in holding

that the rates prescribed by the contract would no longer be sufficiently remunerative to enable the Company to render service to Sandusky and its other consumers. It would be highly desirable from our standpoint that the city authorities be convinced that the acceptance of your offer and the withdrawal of their application here are in the interest of the city.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator.

Attached to the foregoing letter and admitted as a part of Plaintiffs' Exhibit No. 68 was the following letter:

Legal-RTH:ahe-Docket 7004
September 17, 1934.

Mr. Robert L. J. Wagar,
City Manager,
Sandusky, Ohio.

Dear Mr. Hagar:

In reply to your letter of August 30 addressed to the Administrator with regard to Docket No. 7004, electric power project for Sandusky:

(620) On July 30, 1934, the Ohio Public Service Company submitted to you and the members of the City Commission a schedule of domestic rates as follows:

10 kwh per month	$1.00
Next 40 kwh per month	.05 per kwh
Next 150 kwh per month	.03 per kwh
Excess over 200 kwh per month	.02 per kwh

The rates proposed are the same as those proposed to be charged by the municipal plant except that the 2¢ step which while only effective for full service (electric

range and hot water heating) for large dwellings is a lower rate than that effective from the proposed municipal plant.

There being no social benefit apparent which would warrant the duplication of the electric service facilities in Sandusky with rates from both systems the same, as it is doubtful that a sufficient reduction could be made in the domestic rates by the proposed municipal plant and yet provide revenues sufficient to service expenses, interest and amortization, it is the opinion of this Board that the City should accept the Company's proposal and withdraw the application for a loan and grant. I assume that such an acceptance would constitute a contract between the City and the Company under which the said rates would be the maximum to be charged for the said service unless and until the Public Service Commission of Ohio should set aside said rates as unreasonably low. Inasmuch as the Company itself proposed these rates I think it most improbable that the Commission would take such action in the absence of substantial change in economic conditions.

While the City offers general obligation bonds and such bonds are deemed reasonable security, it is nevertheless the duty of this administration to consider rela-
(621) tive social desirability. As the funds of the PWA are insufficient to meet municipal demands it is necessary that projects having higher social desirability be preferred. Where competitive conditions exist and the competitor offers rates as advantageous to the consumers as the proposed municipal rates, social desirability is lacking.

In addition to the foregoing considerations it also appears that the proposed plant is not designed to supply the entire demand. In general a loss of part of a load requires higher charges to the remainder. Hence it appears that if the municipal plant is financed such financing will have a tendency to defer reduction of rates to other consumers served by the Ohio Public Service Company. This consideration might be outweighed by benefits to the consumers served, but those benefits do not appear here.

For the reasons stated it is recommended that the City of Sandusky accept the proposal of the Ohio Public Service Company referred to and notify the Public

Works Administration that it wishes to withdraw its application for a loan and grant.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator.

PLAINTIFFS' EXHIBIT NO. 69 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW.

Washington, D. C.
December 5, 1934.

Mr. Robert L. J. Wagar,
City Manager,
Sandusky, Ohio.

Dear Mr. Wagar:

The Electric Power Board of Review has examined the supplement dated October 29, 1934, to the applica-
(622) tion of Sandusky for a loan and grant to finance construction of a municipal electric system, Docket No. 7004, and is inclined to give favorable consideration to the application on the basis of a generating plant and distribution system to cover the entire city and to serve all the existing consumers with the exception of the larger industrial and commercial consumers. It is believed that the disparity between the rates offered by the existing utility and the rates now proposed by the applicant will make the project socially desirable.

The cost of material and labor has increased since the original application was filed. Before proceeding with its recommendation this Board would like to have a detailed estimate of construction costs based on present prices and wages for the project as above described. The amount of the loan requested should be changed in accordance with the change in estimated construction costs. It is believed that the total cost will not exceed $1,550,000.

A supplement to the application containing the changes suggested, should be received by this Board not later than January 15, 1935.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator.

PLAINTIFFS' EXHIBIT NO. 70 is as follows:

August 2, 1934.

Mr. C. H. Courser, Vice-Pres. & Gen. Mgr.
Florida Public Service Company,
Orlando, Fla.

Dear Sir:

With reference to the application of Mount Dora, Docket #4446, for a loan and grant from this Administration to finance the cost and construction of a Diesel Engine generating plant of 366 Kw. capacity to supply current to the distribution system owned by the munici-
(623) pality; it appears that under date of December 16, 1933, your Company submitted a new contract at a certain rate effective after the expiration of the present contract in March 1935.

Upon analysis of the proposed rate and comparison of the cost of current as between the proposed municipal generating plant and that proposed to be furnished by your Company, it appears that there is no social advantage to the city in generating its own current, provided your company submits an optional rate, based on a demand charge so that any improvement in the load factor due to increased use of the service by the consumer will be reflected in the average cost per KWH purchased.

Please inform me promptly whether or not your Company will submit such optional rate.

Yours very truly,

(SGD) HENRY T. HUNT,
Chairman.

PLAINTIFFS' EXHIBIT NO. 71 is as follows:

Orlando, Florida,
August 16, 1934.

Mr. Henry T. Hunt, Chairman,
Electric Power Board of Review,
Washington, D. C.

IN RE: Docket #4446—Mount Dora, Florida.

Dear Sir:

We are in receipt today of a letter from Mr. Jas. E. Cotton, State Engineer, Federal Emergency Administration of Public Works, Tallahassee, dated August 14th, in reference to the above docket, addressed to Mr. C. H. Courser, Vice-President and General Manager, asking us what reply we had made to your letter of August 2nd, addressed to Mr. Courser.

(624) Permit me to advise that Mr. Courser left the employ of the Florida Public Service Company on June 1st and we had no record here of having received this letter. Evidently it had been forwarded to Mr. Courser, who is now somewhere in New England.

We immediately called Mr. Cotton, who kindly quoted your letter of August 2nd over the phone, and we have since submitted to the officials of Mount Dora a new rate, which is somewhat lower than the rate of which you have a copy, we thought it desirable to discuss with Mr. Cotton in person the new rate that we believe will meet with his approval, and have arranged a conference for tomorrow, the 17th, in Tallahassee. Mr. Cotton no doubt will advise you immediately the result of this conference, together with the rate that has been offered, or will be revised to meet the requirements as suggested in your letter of the 2nd.

Very truly yours,

MILES CARY,
Vice-President & General Manager.

PLAINTIFFS' EXHIBIT NO. 72 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW.

Washington, D. C.
August 20, 1934.

Mr. Miles Cary,
Vice-President and General Manager,
Florida Public Service Company,
Orlando, Florida.

Dear Sir:

This is to acknowledge your letter of August 16 regarding the suggestion made by the Electric Power Board of Review that your Company submit to the Town of Mount Dora an optional rate based on a demand charge. I await with interest the result of your conference of August 17th with Mr. Cotton.

Very truly yours,

(625) (Signed) HENRY T. HUNT,
Chairman,
For the Administrator.

PLAINTIFFS' EXHIBIT NO. 73 is as follows:

Orlando, Florida,
August 31, 1934.

Mr. Henry T. Hunt, Chairman,
Electric Power Board of Review,
Washington, D. C.

In re: Docket #4446—Mt. Dora, Florida.

Dear Sir:

Complying with the suggestion of Mr. Rau and yourself, we have revised the rate schedule offered the Town of Mt. Dora, as of August 27th. We are attaching

herewith a copy of the new proposal for your information.

We feel that we have submitted them a very attractive rate and one much lower than they could possibly generate a like amount under like conditions for the service that they will require. This, together with the assistance that we propose to render the Town of Mt. Dora, in helping them to build up their load, which should materially increase consumption. The electric contractors and dealers in the Town will be included in our advertising scheme, the same as the dealers and contractors in towns in which we own the distribution system. In addition our salesmen will make direct solicitation for increased use of electric service, if the Town so desires. The appliances will, of course, be purchased through stores, dealers and contractors in their town.

We are making headway on our rate study and will be pleased to advise you in detail as soon as it is completed.

Yours very truly,

MILES CARY,
Vice-President & General Manager.

(626) MC:LM

cc-Mr. Jas. E. Cotton, State Engineer,
Public Works Administration,
Tallahassee, Fla.

COUNSEL FOR DEFENDANTS: I do not believe that a letter from Mr. James E. Cotton to Mr. Courser, who seems to be a power main in Florida, is competent even if Mr. Cotton sent a copy to Mr. Hunt. I suggest also Your Honor has not covered in your previous rulings letters that Mr. Cary wrote to Colonel Hunt. It seems to me that they are subject to an additional objection. Perhaps Mr. Hunt's statements are all right, but statements by a power official to Mr. Hunt, it seems to me, are not.

THE COURT: That is true.

That may be admissble to show what Colonel Hunt replied to but they are not admissible as statements of independent evidentiary matters.

COUNSEL FOR PLAINTIFFS: We offer the letters written to Colonel Hunt (Plaintiffs' Exhibits 71, 73) for the purpose stated by the Court, that is, to show the course of the correspondence and not to prove the contents of those letters.

The Court admitted the Exhibits 71 and 73 for this purpose, stating that they enable the Court to understand Colonel Hunt's replies.

(627) DAVID NABOW, a witness for the plaintiffs, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a Civil Engineer by profession and a graduate of Columbia University with the degree of Civil Engineer. I graduated in 1916. I have had employment with Duke Power Company as an engineer since that time. I am now designing engineer in charge of the design of water power and steam power plants. In that capacity I am in charge of the installation of the additional unit in the River Bend plant, located near Mt. Holly, N. C. The plant was started in 1928 and was designed for the eventual installation of eight units. Two of these units were completed in January, 1930 and the third is now being installed. There is room for five more units after this new one is nstalled. The River Bend plant is a steam plant.

The Duke Power Company is essentially a hydro-Electric Generating System, with steam installation, serving as auxiliary plants to insure the supply of energy during periods of low stream flow. The present capacity of the Duke Power Company is sufficient to take care of the existing power demands in its territory and all reasonable demands in the immediate future. We are installing the third unit at River Bend to insure that those demands will be met even if we have extremely dry periods during the immediate future.

This additional unit at River Bend is not needed for the present demands on the system or any that may be anticipated for the next several years. It is needed for anticipated demands only because we want to play safe and have additional capacity.

During the period of my connection with the Duke Power Company which has been since 1916, it has been

its practice to look ahead several years and to build plants as they were necessary to take care of any reasonable demands that we could see ahead for several (628) years. The installation of the River Bend plant is in accord with that same practice.

In addition to the provision for five additional units at River Bend the Duke Power Company has invested about $5,000,000.00 in sites for possible power developments to be developed in the future as the need for same will be shown. As designing engineer it is a part of my duty to design and lay out plans for these developments. We have made a number of studies and are constantly making studies bringing them up to date, so that we are ready to go ahead with the developments at any time. Should occasion arise to go ahead we could start actual construction within thirty days.

CROSS EXAMINATION.

The table you submitted yesterday showing the amount of power generated by the Duke Power Company for each of the years since 1929 is substantially correct. Our largest year with regard to output was 1936 when our output was 2,177,000,000 kilowatt hours. That was almost 200,000,000 over 1929, our previous best year. Going back a number of years the big increase in our business was immediately after the war. It was due mostly to the movement of the cotton mills to the South and to the wearing out of the steam plants that the old cotton mills had and to their purchasing energy from Duke Power Company.

I can't tell you to what extent the increased use of electricity in the private home has affected the increase in our sales. I do not make the studies of the use of electricity. We hope there will be an increase in demand, but we can't tell to what extent such increase will take place. I can't tell you of my own knowledge to what the increase in the past year is due. I believe it is due to additional consumption on the part of the textiles as well as increased use by other customers. Yes, I pre- (629) sume it is due to economic recovery but as I said before I have no definite knowledge as to that.

The third steam unit at River Bend was started in December, 1936. It was authorized in October, 1936, and will be completed in the early part of 1938. Its cost is

estimated at $3,000,000.00. Yes, if you assume that it were run constantly, which was not the intention in installing it, its output would be more than the hydro-electric plant proposed at Buzzard Roost. It would be about four times as much—but it is not intended that the new unit be run constantly. Previous to the unit now being installed the last increase the Duke Power Company made in its generating facilities was the installation of the first two units at River Bend. We have not built any hydro-electric plant since that time. We bought energy from Lexington which began coming in in 1930.

The undeveloped power sites that I spoke of were acquired over a period of years. Some of them were acquired a considerable time back, even before my time. Some of them have been acquired recently. Yes, possibly within the last five or six years.

I am not in a position to say whether the amount of power which Greenwood County hydroelectric plant will be able to sell our customers will seriously damage the Duke Power Company, because I assume that question would concern the business end and I am not conversant sufficiently with the business end to express any opinion.

RE-DIRECT EXAMINATION.

The paper entitled "Kilowatt Hour Output Consolidated, North & South Carolina, 1928-36, incl." gives figures showing the amount of power generated by the Power Company and not the amount sold. There was also marked as an exhibit for defendants a set of figures for (630) the same years showing sales. The difference between the figures shown as output for the years 1928 to 1936 and the figures showing sales in kilowatt hours for those same years, represents losses in transmission, and also includes use around the power plant for auxiliary purposes. This total loss will be about twenty per cent for the system.

Mr. W. S. O'B. ROBINSON, JR.: That brings us to the question of the status of the evidence taken prior to the entry of the final decree, which was taken by Mr. Walters, a Special Master. It is our position that all of the evidence, both the evidence for the plaintiffs and the evi-

dence introduced by the defendants before Mr. Walters, taken by him and reported to the Court, became a part of the record. And if on this trial your Honor rehears the issues determined by Judge Watkins, in addition to trying the questions as to any subsequent change, that evidence being a part of the record, it is to be considered. Because this being an equity case, where evidence is taken, it becomes a part of the record. It is not like a law case where a new trial means the reintroduction of all the evidence.

Mr. D. W. ROBINSON, JR.: If your Honor please, I may be able to shorten this. We are not in accord with Mr. Robinson with regard to the law. However, we are perfectly willing for the old record to go in, provided we have the right under the issues as now made to make such objections to any part of the testimony that we would care to.

The COURT: All right. Now, so much for that testimony that was taken before Mr. Walters, the Special Master. Then we come to the second class of testimony that is in the history of this case, that is the testimony that was taken before Judge Watkins in Spartanburg. Now my conception is that testimony would come initially before me, with the duty of ruling as to its relevance and competency and so forth.

(631) Mr. W. S. O'B. ROBINSON, JR.: Exactly Your Honor, that is the way I understand it. We have covered that testimony in the second paragraph of the stipulation, and that testimony may be used by either party just as though it were a deposition.

Mr. D. W. ROBINSON, JR.: My understanding is that your Honor has ruled that the evidence taken and reported by the Special Master before Judge Watkins' original injunction decree as such evidence is contained in the printed record is before the court, subject to any new objection we might make, together with all exhibits introduced before the Master, Mr. Walters, whether such exhibits are printed or not.

The COURT: That is right.

Mr. D. W. ROBINSON, JR.: Shall I state my objections to the testimony which is in the old record? I have outlined my objections to portions of the testimony.

The COURT: Did you raise your objections before Judge Watkins?

Mr. D. W. ROBINSON, JR.: Some of them.

The COURT: Did he rule on them?

Mr. D. W. ROBINSON, JR.: He made no definite ruling. I moved before Judge Watkins to strike the engineering testimony.

I think there were two classes of objections I made. One was hearsay and one was an objection going to the entire testimony, the engineering testimony. I want to urge those objections before your Honor and there is one other objection which was not noted before Mr. Walters that I wish to make with the privilege of the Court here. so I can easily call them to your Honor's attention, if that is the proper procedure.

The COURT: Go ahead.

Mr. D. W. ROBINSON, JR.: Well, with respect to the engineering testimony on which Judge Watkins commented on the bottom of page 475: "On that point, Mr. Robinson, my present view is this: that in the making up of those estimates, where there is substantial evidence (632) at all to support the finding of the administrator, the Court ought not to interfere with it; that there is a large discretion in those matters and that the Court certainly would not interfere with the exercise of a discretion that is not unreasonable", and he ruled with us on that point.

The COURT: I think that is right and I will rule that way on that evidence here. Let's get that specific. The Court adopts the language appearing at the bottom of page 475 of the record, starting with the words: "The Court: 'On that point, Mr. Robinson, my present view is this," and ending with the words "That is not unreasonable", at the end of line 6 on page 476, (quoted above). The Court takes the view that the ruling of His Honor Judge Watkins was very clearly correct, and is at least approved by inference from the opinion of the Circuit Court of Appeals.

Plaintiffs objected to this ruling. The Court overruled the objection. An exception was taken by the plaintiffs and allowed by the Court.

Mr. D. W. ROBINSON, JR: There are one or two other parts of the original testimony on page 173 of the transcript, the original stenographer's transcript, pages 173 and 180, the testimony of Mr. E. C. Marshall. We objected I believe at that time, and we object now to Mr.

Marshall expressing an opinion on whether the County could build its plant without the loan and grant agreement upon the ground that the answer to that question would be an opinion with respect to which Mr. Marshall is not qualified to express an opinion and that it is irrelevant.

The COURT: It is a very small matter, but I reckon that is right, yes, sir, I reckon that would be stricken out. In other words, you take the position he hadn't qualified as an expert on the financial power of Greenwood County.

Mr. D. W. ROBINSON, JR: I don't believe the witness should be alowed to give his opinion on a matter of whether we could sell our bonds if he was not qualified.

The COURT: Well, I am ruling with you on that.

Mr. W. S. O'B. ROBINSON, JR: Now on page 180, as I understand it, your Honor is excluding the answer, "I don't believe it would be possible to sell them."

The COURT: I think that is probably true. There is no showing Mr. Marshall was an expert on county administration and sale of bonds and things of that kind. Furthermore than that, I think it is irrelevant.

Well, I think it is a very small matter and I think it is irrelevant and I am going to grant his motion to exclude it. I don't think it makes a great deal of difference. The issue in this case is not between municipal plants and one aided by the government. The fact one of them might be able to finance it, they have been financed before, the fact Greenwood County probably has a pretty large outstanding indebtedness, not such a terribly rich county, although a very fine place and a fine county, I don't see where that would make any difference in this case.

Mr. W. S. O'B. ROBINSON, JR: What is the extent of your Honor's ruling?

The COURT: I think starting with the question, "Mr. Marshall, if Greenwood County did not have the benefit of this federal financing, etc., what do you say as to whether the county would be able to finance that project?" I say from there down to the cross examination I think we will strike out.

Mr. W. S. O'B. ROBINSON, JR: If your Honor please, we don't object where he has the objection, "I don't believe it would be possible to sell them", but the other questions and answers to which there were no objections

taken at the time—and what we are trying to bring out there was if the county didn't have this grant of 30% behind the revenue bonds and was undertaking to issue revenue bonds to build this plant, that it would not be able to sell the bonds because there would be nothing behind them, and endeavoring by that line of evidence to support our position that the real cause of our injury is this federal subsidy here behind the grant.

The COURT: All right. Mr. D. W. Robinson, what do you say about that? He says I ought to stop in my exclusion down there at the words, "I don't believe it would be possible to sell them."

Mr. D. W. ROBINSON, JR: If your Honor please, I think he gives the substance of his reasoning further down. I think it is just as objectionable as his original conclusion.

The COURT: Well, if you gentlemen require me to rule I am going to rule it all out on the ground not so much that it is an opinion but it is irrelevant.

(To this ruling Plaintiffs objected. Exception was duly taken and allowed).

Mr. D. W. ROBINSON, JR: Now, if your Honor please, we wish to exclude the portion of Mr. Clarence E. Rose's cross examination contained I believe on page 299 of the printed transcript in which Mr. Rose goes into some discussion which might be construed as expressing some opinion on the policy and motive of the Public Works Administration.

The COURT: Well, the Circuit Court of Appeals said they didn't consider it anyhow, didn't they?

Mr. D. W. ROBINSON, JR: Well, I think in substance they said that.

The COURT: They said a cabinet officer would not be held responsible—I don't know the exact words they use—for some man who didn't fully understand the purview of his authority. That is what they said. I won't strike it out but I will let it stay in and have in mind what the Circuit Court of Appeals said about it when I go to rule on it. And furthermore Mr. Ickes testified fully a repudiation of—how far his repudiation is correct that is just one of those difficult things, the weight of evidence—the theory is at least the chancellor will be able to ferret it out and decide intelligently. Cer-

tainly the Circuit Court of Appeals has felt it can safely say it will follow Mr. Ickes' statement rather than Mr. Rose. With their guide I think I can do the same thing.

Mr. D. W. ROBINSON, JR: Those are all the objections I have.

The COURT: Well, I am not going to strike out the cross examination of Mr. Rose, because I think that under a liberal view of cross examination it was responsive to matters raised in direct, and that ruling must be understood in connection with the fact that Mr. Ickes himself later testified as to the scope of Mr. Rose's authority. Furthermore the matter was of such importance in the case for the attention of counsel on both sides to be focused on it, so much so that it must have been mentioned in the argument in the Circuit Court of Appeals. This Court cannot see how it would be abusing its discretion in leaving in testimony in here for whatever it is worth. That is my view about it, gentlemen, right or wrong.

(To this ruling over objection exception was duly taken by Defendants and allowed).

Mr. D. W. ROBINSON, JR: The time has come for me in order to make the record clear to move to strike the testimony which we have objected to of various witnesses that have been introduced yesterday and today on the ground that we noted at that time, and upon the further ground that that testimony is not responsive to any new issue which has come up in the case since the pleadings were amended.

I think the plaintiffs take the position the situation is the same as it was then and we submit that this new testimony is not responsive to any new issue in the case. I would like to move to strike it all out.

Mr. SCOTT: We join in the motion of the County to strike.

The COURT: I will overfule both motions and won't burden myself or counsel with a restatement of the various reasons I have in mind in refusing to grant those motions. I think the testimony is admissible. That is my honest view on it, gentlemen. I think it is admissible on the various grounds I stated.

Mr. D. W. ROBINSON, JR: If your Honor will allow

us an exception, and the government joins in the objection I made to various parts of the whole record.

The COURT: All right sir. That is understood. Exception taken and allowed.

Mr. D. W. ROBINSON, JR: I think for the benefit of all counsel that perhaps I would like to see if my understanding is correct. My understanding is that your Honor has ruled that the old record taken before Judge Watkins' original injunction orders as contained in the printed record is before the court, subject to any new objection we might make.

The COURT: That is right.

Mr. D. W. ROBINSON, JR: Both the government and myself made objections to it yesterday, and in addition to that, certain exhibits which were not printed but which were introduced before the Master, Mr. Walters, in Greenville, are also in the record; all the exhibits whether they are printed or not. I think that clears up that matter.

Mr. DEMPSEY: Is it your Honor's ruling that the Supreme Court Record or the record presented to the Circuit Court of Appeals is now before the court?

The COURT: We discussed that and it is the record that went to the Circuit Court of Appeals.

Mr. D. W. ROBINSON, JR: The record that went to the Court of Appeals, so far as concerns the original evidence taken before the Special Master, is the same as the record that went to the Supreme Court. We have agreed among ourselves to use the narrative as printed in the record rather than the long transcript made before the Special Master.

The COURT: Is that agreeable to you Mr. Dempsey?

Mr. DEMPSEY: Yes, sir.

The COURT: We are using the copy of the record (633) that went to the Circuit Court of Appeals.

Mr. D. W. ROBINSON, JR: As I understand it we are using the narrative of the testimony of J. N. Stribling, J. E. Willoughby, E. C. Marshall, J. E. Sirrine, W. G. Perry, George Wrigley, C. P. Roberts, F. H. Cothran, W. D. Faucette and M. R. Kimbrell, witnesses for the plaintiffs as it appears in the printed transcript of the record for the Circuit Court of Appeals beginning on page 157 and extending through page 263. We are using the narrative of the testimony of defendants' witnesses J. W. Barnwell, D. T. Duncan, G. R. Barksdale, F. H.

Sweeney, J. G. Wardlaw, F. H. H. Calhoun, A. C. Bruce, Clarence E. Rose, W. A. Barnett, R. E McCaslan, J. C. Smith, S. M. Leaman, J. H. Milford, M. G. Boyle, M. C. Willard, Emmett I. Davis, and J. B. Sloan, as it appears in the record at pages 264 to 316; and the narrative of the testimony of plaintiffs' witnesses in rebuttal J. M. Costello and Charles S. Reed, as it appears at pages 316 to 324 of the record. We are also using plaintiffs' exhibits Nos. 1 to 45, inclusive, and defendants' exhibits 1 to 67, inclusive. Excerpts from these exhibits were, for convenience, printed as a part of the record for the Circuit Court of Appeals and appear on pages 324 to 474 of the record. It is understood, however, that the original of these exhibits are before the court and may be used.

Mr. W. S. O'B. ROBINSON, JR: That is my understanding.

The COURT: That is right.

Mr. W. S. O'B. ROBINSON, JR: We have a few other exhibits we will want to introduce as soon as we can check over them.

The COURT: You may offer them later on.

Mr. W. S. O'B. ROBINSON, JR.: With that permission the plaintiffs close.

(634) **DEFENDANTS' EVIDENCE.**

Mr. DEMPSEY: I offer as defendants' exhibit 70 for identification a letter dated March 22, 1934, from the Administrator of Public Works which was written pursuant to a Senate Resolution requesting a report of the business of the Federal Emergency Administration of Public Works.

I offer as defendents' exhibit 71 for identification a letter from the Administrator of Public Works written pursuant to a resolution of the Senate requesting a list of non-federal projects approved by the Administrato. but for which allocations have not been made because of lack of funds, and a list of non-federal projects not yet approved by the Administrator, the lists to indicate as to each project, its location, type, estimated cost, the amount of loan requested and the amount of grant requested.

I offer as defendants' exhibit 72 for identification a letter from the Administrator of Public Works dated

March 6, 1936, written pursuant to a resolution of the Senate directing the Administrator to report a list of all projects involving the generation, transmission and distribution of electric power and gas for which allotments had been made by the Public Works Administrator and to indicate which projects were under construction and which had been delayed because of litigation.

I offer as defendants exhibit 73 for identification a letter from the Federal Emergency Administrator of Public Works in response to a Senate Resolution requesting a list of non-federal projects pending in the Federal Emergency Administration of Public Works, the list to indicate as to each project its location, its type, etc.

I offer as defendants' exhibit 74 for identification a document printed by the Government Printing Office, entitled "Extract from Hearings before the Sub-Committee of the Committee on Appropriations, United States Senate, 74th Congress, Second session on H. R. (635) 12624."

I now offer in evidence the foregoing exhibits 70 to 74 inclusive.

Mr. W. S. O'B. ROBINSON, JR: Plaintiffs serverally object to the introduction of each of these exhibits on the grounds that they are hearsay, self-serving declarations; irrelevant, incompetent, and immaterial; and insofar as they may set forth facts concerning this case such facts should be presented by witnesses having knowledge of them. Plaintiffs object to defendants' exhibit 70 on the additional ground that it does not relate to any change supervening since the entry of the original decree and if admissible at all was admissible on the original hearing.

The COURT: The objection is overruled and the exhibits are admitted in evidence..

Mr. W. S. O'B. ROBINSON, JR.: Plaintiffs desire an exception to the admission of each of the exhibits.

The COURT: The exception is severally allowed the plaintiffs to the admission of each of the exhibits.

Mr. DEMPSEY: I offer as defendants' exhibit 75 for identification an official Government Publication printed by the Government Printing Office, entitled "Revenue Bond Financing by Political Subdivisions, Its Original Scope and Growth in the United States". This was prepared by the Public Works Administration and in a

large part discusses the experience of the Public Works Administration with respect to revenue bonds. I offer it for the purpose of showing that revenue bonds do constitute reasonable security of an investment depending upon circumstances of the case.

The COURT: I think it is beyond the bounds.

Mr. DEMPSEY: May we have an exception?

The COURT: Exception taken and allowed.

Mr. DEMPSEY: I offer as defendants' exhibit 76 for (636) identification a reprint by the Government Printin Office from the Monthly Labor Review, issue of October 1936. It is an article entitled "Employment created by PWA construction".

The COURT: I don't think it is admissible as evidence in this case.

Mr. DEMPSEY: May we have an exception?

The COURT; Exception taken and allowed.

Defendants introduced in evidence as defendants' exhibit 77 a mimeographed copy of order 73 signed by Harold L. Ickes, Administrator of Public Works, installing the Electric Power Board of Review. This exhibit is the same as plaintiffs' exhibit no. 46.

Mr. DEMPSEY: I offer as defendants' exhibit No. 78 for identification mimeographed copy of order No. 141 signed by Harold L. Ickes, Administrator of the Public Works Administration. It is an order dated March 16, 1936, dissolving the Electric Power Board of Review and is offered only for the purpose of showing that the Board was dissolved.

The COURT: Exhibit is admitted in evidence.

Mr. DEMPSEY: I offer as defendants' exhibit No. 79 for identification a memorandum entitled "Memorandum for Mr. Hunt from the Administrator dated January 20, 1935", signed with the initials "H. L. I."

Counsel for plaintiffs: Plaintiffs object to the introduction of the exhibit upon the grounds heretofore stated in their objection to defendants exhibits 70 to 74, inclusive.

The COURT: The objection is overruled. The exhibit is admitted in evidence.

Counsel for plaintiffs. May we have an exception?

The COURT: Exception taken by plaintiffs and allowed.

Mr. DEMPSEY: I offer as defendants' exhibit No. 80 for identification an original letter from Harold L. (637) Ickes, Administrator of Public Works to the City of Coeur d'Alene, Idaho, with an attached enclosure consisting of a proposed loan and grant agreement between the United States and that City. The date of the letter is March 16, 1936, a copy of which is hereto attached.

Mr. W. S. O'B. ROBINSON, JR.: Plaintiffs have been asked to waive the question of the authenticity of this letter. We do waive that question. We would like to have it stipulated in the record as a part of our objection to the letter that it was made the basis of a motion filed by the Secretary in the United States Circuit Court of Appeals for the 9th circuit in the case of *Washington Water Power Co.* vs. *City of Coeur d'Alene, et al.* The motion was for the remand of the case to the district court. While the motion was pending and before it was acted upon Mr. Ickes, who was appellant in this case, withdrew his appeal. The letter was a part of the motion.

Mr. DEMPSEY: That is right.

Mr. W. S. O'B. ROBINSON, JR.: Plaintiffs object to the introduction of the letter upon the ground that it is hearsay; is a self-serving declaration; and that it was written after the litigation had arisen in the Coeur d'Alene case as well as after the litigation in the case at bar.

The COURT: But you produce letters that Mr. Ickes wrote to your witnesses. Of course, it is true you produce the witnesses here.

Mr. W. S. O'B. ROBINSON, JR.: I do not think it is proper evidence in reply to the evidence we introduced Mr. Ickes being a party to this suit, statements by him are admissible as admissions or statements against interest. But, of course, that same rule does not apply to this letter offered by him.

The COURT: I will admit it.

(638) Mr. W. S. O'B. ROBINSON, JR.: We wish to enter an exception.

The COURT: The exception is taken by plaintiffs and allowed.

Mr. DEMPSEY: With respect to this and other ex-

hibits relating to the line of testimony which is now in evidence you understand we don't waive any objections to that testimony.

The COURT: Certainly I understand. This evidence is offered for the defendants Ickes without waiving their rights to object to the Couer d'Alene, Post deposition we will call it, with respect to the Couer d'Alene property.

Mr. DEMPSEY: I should also like to note that it is our contention that we never had tried to control these rates and we have not had a change of policy in that respect and I want it not to be understood that we agreed.

Defendants offered and the Court admitted in evidence the following exhibits:

Defendants' Exhibit No. 81, being a letter dated August 13, 1934, from Mr. D. E. Byerley to Col. Henry M. Waite, Deputy Administrator.

Defendants' Exhibit No. 82, being a letter dated April 4, 1935, from Edwin Vennard to Henry T. Hunt, Chairman, Electric Power Board of Review.

Defendants' Exhibit No. 83, being a mimeographed copy of the offer dated December 31, 1935, by the United States of America through the Federal Emergency Administration of Public Works to the City of Dowagiac to aid in financing the construction of an electric generating plant and distribution system.

Defendants' Exhibit No. 84, being a copy of an offer dated January 15, 1936, made by the United States of America, through the Federal Emergency Administration of Public Works to the City of Sandusky, Ohio, to aid in the financing of the construction of an electric generating plant and distribution system.

(639) (To those parts of the following evidence of defendants which is enclosed in brackets, as hereinafter shown, the plaintiffs duly objected—in addition to the objections specifically shown—upon the grounds that said evidence does not relate to any change supervening since the original hearing or the entry of the original decree in this case; but related to matters heard and determined on the original hearing and is irrelevant and immaterial. The objections were overruled by the Court and exceptions were duly taken by plaintiffs and allowed

by the Court to each and every part of such evidence. It is agreed by counsel for defendants, with the approval of the court, that said objections and exceptions need not be separately stated.)

Defendants introduced the testimony of Harold L. Ickes taken before Judge Watkins at the hearing in Spartanburg on December 12, 1935, this testimony being introduced as a deposition, under the stipulation set forth at the beginning of this narrative, the testimony being as follows:

(640) HAROLD L. ICKES, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. FRANK:

I am Secretary of the Interior of the United States and also Federal Emergency Administrator of Public Works. I am a member of the Illinois Bar and have practiced law in that state for many years. Horatio B. Hackett is Assistant Administrator of Public Works. I am familiar with his signature having seen him write it a number of times. The contract dated November 30, 1935, between Greenwood County and the United States of America was signed by Mr. Hackett. I specifically authorized him to execute the contract and approved the contract and do now approve it.

Contract referred to dated November 30, 1935, was admitted in evidence as Defendants' Exhibit No. 86.

This contract, Defendants' Exhibit No. 86, contains all the understandings and agreements of whatsoever kind between me and the County of Greenwood. The Public Works Administration of The United States Government has no other arrangement of any kind with Greenwood County relating to the project, which is the subject of the contract.

(As to whether I, as Administrator of Public Works or the United States, or both, intend to exercise any control or influence of whatever kind, over the rates to be charged by Greenwood County, and its proposed plant,

so far as the Public Works Administration and the United States Government are concerned the answer is "no". As bondholders, the situation might arise where we would be very much interested in the rates. My interest in that respect would be strictly limited to that of a bondholder—such interest as any bondholder would have under the laws of South Carolina.)

(641) The bonds referred to in this contract (Defendants' Ex. No. 86) are revenue bonds. The security behind them is the earnings of the proposed power plant.

(Under the statute under which I am operating, Title II of the National Industrial Recovery Act, my interests in these earnings is that they shall be at least large enough to give reasonable security for our investment.)

(I have no interest in the rates of the County's competitors because of our investment in the County's plant. The fact that the rates of plaintiffs' were high or low might indirectly affect the security of the County's bonds. If the plaintiffs reduced their rates below the cost of producing and supplying current and the County had to meet these rates in order to hold its customers, it would have indirectly an affect.)

(Other than that which I have just indicated, neither I nor the United States Government has any interest in plaintiffs' rates.)

I have had called to my attention the opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Arkansas-Missouri Power Company* vs. *City of Kennett, Mo.*, reported in 78 Fed. Rep. (2d) 911, and I have read at least a part of it. Mr. Foley, Director of the Legal Division of the Public Works Administration, called the opinion to my attention the latter part of August. He did so because from the point of view of our power projects the decision was rather disturbing. It seemed necessary to make some revision in our contracts in order to meet the objections stated in the opinion of the court. We discussed the opinion in general terms and I authorized him to go into the whole

matter in the light of the opinion, take up the matter with the engineering and other divisions of the Public Works Administration, and see whether a contract could (642) be drafted which would stand the test of this opinion. Such a revised form of contract was subsequently approved by me, the latter part of September. I do not think that was a very long time to draft a contract of that importance.

After I approved this contract, contracts in the new form were sent out to cities in a number of instances and lead to the reformation of the contract in some instances. There was a substitution in the case of the City of Hominy, Okla. There were some more. I don't happen to remember all the names; possibly fifty all together.

My recollection is that the revised form of contract was called to the attention of the Court of Appeals for the District of Columbia in litigation relating to the PWA contract with the City of Hominy and lead the Court of Appeals to remand that case to the lower court.

The form of contract which resulted from the circumstances to which I have referred has been modified subsequently. This occurred as a result of the decision of this Court in the Greenwood County case. The decision seemed to rest on other grounds than those on which the decision in the Missouri case was based so it seemed necessary to have a further revision. This was called to my attention early in the first half of November. Prior to that time I had been told the substance of the opinion. I don't recall that I had ever read the opinion at that time. I have since.

It seemed to me in the Greenwood County case that His Honor based his opinion, more or less, upon the assumed reservation of power in the Public Works Administration to regulate rates after the project was built. I may say for the record—I may say on the basis of the record thaa went in here, that his Honor was entirely right. I have reference to certain testimony that went into the other case which standing by itself, uncontradicted, that we had made certain reservations.

(643) I am referring to the testimony of the witness Rose. As a result there was work done and a further revision of the former contract. I urged that the revision be hastened and did everything possible to hasten it. The work was completed about the latter part of

November. I don't know when it was submitted to the Greenwood County authorities. It was executed on the 30th of November.

Q. Were your intentions and purposes under the former contract with Greenwood County—contract of December 8, 1934,—in any way substantially different from what you have just indicated?

Objection by counsel for plaintiffs on the grounds that the question does not relate to any change supervening since the orignal hearing and the entry of the original decree in this case; but relates to matters heard and determined on the original hearing of the case, and is irrelevant and immaterial to any matter properly before the court on the retrial.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. None at all.

Q. I call your attention to Senate Document 169, 73rd Congress, second session, or a copy of the same, being entitled "Letter from the Administrator of Public Works pursuant to Senate Document No. 190, a report of business of the Federal Emergency Administration of Public Works for the period ending February 15, 1934". Such letter being dated March 22, 1934. And ask you to turn to page 9 of that report headed "Part III Policy of the Public Works Administration". The first sentence reads: "The fundamental purpose of the Public Works Administration is to relieve unemployment and increase purchasing power through the construction of useful public works, thereby increasing the production of goods and also providing employment in the capital goods industry." Is that a correct statement of the policy of the Public Works Administration?

(644) Objection by plaintiffs on the ground that the question is leading and also on the other ground stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. It is.

(Senate Resolution No. 190 is quoted on the fly-leaf of Senate document 167, Deft.'s Ex. 70. Subsection (3) is the request from the Senate for a statement of the policies of the Public Works Administration. This entire document was intended to be in response to that resolution, and included this Subsection (3).)

(This document includes the statement "of a large number of projects, applications for which were made to me by municipalities".)

(In no instance did I solicit specific applications. The applications came voluntarily from the community that wanted the Public Works project, accompanied by engineering and legal data. Sometimes it was *incomeplete* and we had to send back for additional information, but it was always initiated by the local community. I am referring now to non-federal projects.)

(645) (Of the total aggregate of non-federal projects, measured in money terms, I cannot say accurately what percentage consisted of accepted applications relating to competitive municipal power projects, but I would say that it would not exceed 2% or probably less. In general terms some of the various kinds of non-federal projects covered by accepted applications consist of courthouses, school buildings, sewage projects, water works, street paving, public buildings of various sorts, a great many school houses and college buildings. I think that any type of structure that is used for municipal service you can include in the list of applications we had.)

(Neither I nor the Public Works Administration nor the United States Government initiated or instigated or induced the making of applications for competitive power projects. We did not in the particular case of Greenwood County.)

Q. On the question as to the merits of the projects of that type in the general category of which the Greenwood County Project is one instance, did you, or do you, *weight* any considerations other than those involved in other types of applications?

Objection by counsel for plaintiffs on the grounds noted above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. No, we consider them all on the same basis and applied the same principles on all of them regardless of the project.

(The primary considerations were social desirability, ability of the community to finance its share of it and its relationship to the question of unemployment.)

(Where the municipality was proposing to borrow money from the Public Works Administration on general revenue bonds we did not give any consideration to the rates of the project.)

Q. To what extent if at all were you interested in (646) the question of comparative rates to be charged by a proposed public utility to be operated by the municipality, as compared with the rates charged by private existing companies with which the city or municipally-owned project would have to compete, where the bonds were revenue bonds.

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. Well our interest in revenue bonds was whether or not—our interest in the matter of rates with reference to projects, where we took revenue bonds, simply went to the question of whether or not the rates to be charged would pay our loan within the time limited in the contract.

Q. In connection with the application of Greenwood County, did you take into account other considerations—considerations other than those to which you have heretofore referred?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. No.

(When an application came to me with the approved findings by the three various divisions of the Public Works Administration, I approved it without further question. I think practically in every case. There may have been some exceptions where I had personal knowledge of the project and therefore wished a personal opinion. If there was a difference of opinion between the divisions—and that arose in a number of instances, for instance the project would come with the approval of the engineering staff and with the approval of the legal staff, but the finance division would disapprove it—then I would call in the heads of the divisions and they would state their case to me. Sometimes I would refer it to the Board of Review, and sometimes after the Board of (647) Review had passed upon it, it would come back to me.)

(No one other than myself was authorized to determine the policies of the Public Works Administration except the President. This same answer applies to the question as to whether anybody other than myself was authorized to express the policies of the Public Works Administration.)

There was an employee on the staff of the Public Works Administration named C. E. Rose. His duties were and are those of an examining electrical engineer. (He had no authority in the final approval of applications. It was merely his duty to investigate and report the facts.)

(He had no authority to formulate, or to participate in the formulation of the policies or the manner in which applications should be passed on.)

(He was not authorized to fix the rates of municipally owned projects.)

Q. Did he have any authority to speak for the Public Works Administration with respect to questions of policy?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. He was not authorized to speak for the Public Works Administration with respect to anything, policy included.

Q. Have you read the testimony given by Mr. Rose in this case?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. Yes, I have.

Q. Have you any comments to make with respect to it?

Objection by plaintiffs on the grounds as stated above and on the additional ground that Mr. Ickes was not entitled to contradict the previous testimony of the witness, Rose.

(648) COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. Well, I think he was suffering from delusions of grandeur. He had no authority to expound, or determine or say, what the policy of the Public Works Administration was and he certainly undertook to do that in large measures.

Q. Was his testimony with respect to the rates of Greenwood County or the plaintiffs in this case, a correct statement of the policy, intentions, or purposes of the Public Works Administration?

Objection by plaintiffs on the grounds as stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. No, it was not. He may have been right on his figures on rates, which I am not competent to testify in respect to, but on policy he was not correct.

Q. Was his testimony with respect to the policy of the Public Works Administration concerning rates, so

far as it differs from your previous testimony as to the policy of the Public Works Administration, correct?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. No.

This testimony of Mr. Rose was first called to my attention very recently. I cannot fix the precise date.

The contract of December 8, 1934, contains a provision reading as follows: "The Government shall be under no obligation to pay for any of the bonds or to make any grant if the borrower shall not have adopted a resolution satisfactory in form and substance to the (649) Administrator, providing for rates to be charged for services afforded by the Hydro-electric System."

(The meaning of this provision was that we had no intention of lending the Government's money on this project unless we had at least an initial assurance that the rates charged would be sufficient to pay the bonds that we bought with interest. I think the language is clear. "Shall not have adopted" does not refer to the future at all. There is no reservation of future power in that section of the contract.)

Q. I call your attention to Plaintiffs' Exhibit #35 in this case, or to a copy of the same, a press release dated September 24, 1934, of the Federal Emergency Administration of Public Works, and have handed you the same. Are you familiar with the terms of that press release?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. I am.

Q. Does it correctly set forth your policy in passing on applications for competitive electric power projects?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. Not standing alone.

Q. Insofar as it differs from your policy as stated in your testimony given today, which would be the more accurate; your testimony or that press release?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. The testimony I am giving today more accurately (650) reflects the policy of the Public Works Administration.

Q. Then at the time of the issuance of that press release?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. It does.

(Neither I nor the Public Works Administration nor the United States Government were intending to engage in the operation directly or indirectly of the Greenwood County power project after it was built under the contract of December 8, 1934.)

Making the assumption that the net amount of the loan in this case is approximately $2,170,000.00 and the grant not more than $682,000.00, so that the aggregate of the loan and grant is $2,852,000.00, that portion of the aggregate amount which consists of the loan would be paid off in yearly payments. On each due date when the coupons fall due the interest would be paid, and there would be payment by amortization of the principal over the life of the loan. The bonds bear interest at the rate of 4%. If the loan is paid out according to its terms, the Government will receive the full amount of the loan

and the grant with a nominal interest rate, which I think has been figured at 1.6%. I could have made a loan of the total amount instead of making part loan and part grant. In some cases we did make loans instead of loans and grants. I could, under the law, in my discretion or under the executive order of the President have made a loan of the full amount with interest at 1.6%.

Mr. W. S. O'B. Robinson, Jr.: If your Honor please this cross examination is made subject to the exceptions to the evidence heretofore taken by plaintiffs and without waiving any of such exceptions.

The Court: All right, sir.

Cross Examination.

(651) This suit was started before this Court November 7, 1934. At a press interview in Washington on November 22, 1934, I referred to a former suit that had been instituted in the Supreme Court of South Carolina by a state taxpayer to test the validity of this project and stated that the Duke Power Company was seeking two days in court. In making this statement I intended it to be understood that the Duke Power Company was unnecessarily delaying this whole matter, holding up the spending of this money which had been appropriated by Congress to give employment. I was informed that the Duke Power Company had either been a party litigant in the suit before the State Court or had intervened and therefore had a standing before the court. I did not know that the Duke Power Company had attempted to intervene and had been denied the right of intervention. The President of the Duke Power Company wired me on November 23rd and I don't recall whether I have replied to that telegram. My special assistant acknowledged it on November 27th and I don't know whether that was the only notice given to it or not.

(652) I do not recall whether at the same interview I stated: "I don't agree with the Duke Power Company. I think they have been charging unfair rates." I may or may not. If you are relying on the published report I would want something more authentic than that. I did

not at the time keep minutes of press conferences. I do now because I have been so frequently misquoted.

I recently published a book entitled "Back to Work", with the sub-title "The Story of PWA". It was published in June, 1935, and the date of the preface is May 15, 1935. It was published after the decision of this Court on the motion to dismiss which was rendered in April, 1935. In this book I have a chapter, Chapter 6 entitled "Cheap Power".

(653) On page 140 after making some remarks about power companies, I say: "Yet as might be expected, there has been bitter opposition to our acting favorably on requests for funds to build municipal utility systems. Subterranean influence has been brought to bear and every sort of legal obstacle has been thrown in the way of such loans. The private utilities by direct frontal or by flank attacks have held up many projects month after month. Typical of the resistance put up by the private companies to public ownership of utilities is the somewhat long but illuminationg story of the Greenwood County project at Buzzard's Roost South Carolina."

Q. Then turn over to page 146.

WITNESS: There is some intervening matter on page 143.

COUNSEL: We will get to the intervening matter.

On page 146 I say: "PWA asked the county to hold up construction until the State Supreme Court could rule on the matter. As the result of a test suit, the county was given the right by the court to go ahead with the project. Although this suit gave it its day in court, the Duke Power Company was not satisfied; it wanted two days. After trying in vain to persuade the State courts to delay the project, the Duke Interests asked the Federal courts for an injunction."

I believed the Duke Power Company was in the State case directly or indirectly. You cannot always prove that a public utility is in court, when a taxpayer is ostensibly party plaintiff. As to whether I can give you any facts upon which I based the charge made in my book, it was made on information and belief. I don't recall what in-

formation I had. It may have been the fact that it was apparently a taxpayer suit.

On page 143 of my book, I state, referring to the County project "The fact is that it was proposed to distribute more than 80% of the power to be developed at Buzzard's Roost to new industrial and rural customers at a reasonable rate, something the Duke Power Com-
(654) pany does not seem to be able to do". I meant to say there that the Duke Power Company's rates are not reasonable and I think I say so quite plainly.

As to what the Duke Power Company's rates are I could not say offhand, but a study was made of them. This study was made by the PWA engineers and financial experts who were working on this project. They looked into the Duke Power Company's rates. As to whether I examined or checked their studies of the Duke Power Company's rates or had done same when I made the statement contained in my book that they were unreasonable, my answer is "No" that I took the result of the members of my staff. I have already answered the question as to whether I had anything upon which to base my statement that the Duke Power Company's rates are unreasonable. Mr. Rose was one of the engineers that worked on this investigation of the Duke Power Company's rates for me. I don't know when he came into the case. He wasn't under my personal direction. I was interested in the Duke Power Company's rates because they had a bearing upon whether this project could be built and charge rates—sell enough power at those rates to liquidate its bonds to the Public Works Administration, with interest. It is true that the higher and more unreasonable the Duke rates were the better off we would be, so far as bondholders would be concerned, but that would not make the Duke rates reasonable.

I charged in my book that the Duke rates were unreasonable because I believed it. The unreasonableness of the rates was the concern of any individual; especially the concern of a government official in my position. As to whether the Railroad Commission of South Carolina has not performed its duty in regulating rates, counsel is trying to get me to do what he criticizes me for doing —making statements on uncorroborated facts. Yes, I made the statement in my book that the rates of the Duke Power Company were unreasonable. As to whether I

had any facts upon which to base my statement, I did have information.

At the time I published my book I had not looked at the report of the Federal Trade Commission on its in-
(655) vestigation of the Duke Power Company. As a matter of fact, I did not know that the Duke Power Company had been investigated by the Federal Trade Commission.

At the time I published my book I did not inquire into the facts to ascertain whether the project as then outlined and planned by the County and by the Public Works Administration would sell power to no customers except customers of the plaintiffs' in this case. The officials of the County merely showed that they would sell enough power to liquidate their indebtedness to us.

On page 144 of my book I referred to the hearing before the Power Board of Review, and said: "As might have been expected, officials of institutions receiving financial aid from the Duke Endowment, protested any action which might reduce the incomes of their institutions. If they sensed the injustice of levying enormous tribute upon the people in order that their own favored institutions might receive gratuities they gave no evidence of it". When I referred in the book to "the injustice of levying enormous tribute upon the people" I was referring to the rates which the Duke Power Company was charging its customers. That's the tribute. I have already answered the question as to what facts I had upon which to base the charge in my book that the tribute was enormous and unjust. I have already stated, in response to the question, that I had reason to believe that the rates charged by the Duke Power Company were excessive; based upon the cost of production.

Q. I am trying to find out what facts you had, not what beliefs you had. If you had any facts, I want them. A. May the Court please, I am perfectly willing to go over in magpie fashion, but I have gone over that dozens of times. I have admitted that I had no facts. I acted on information and belief.

Q. Yet without any facts, you were willing to make this charge in your book, and publish to the world that the Duke Power Company's rates were unreasonable and unjust? A. I still believe it, sir. I still believe they are unreasonable based upon information and belief.

(656) I cannot say that there has been any change in my attitude or feelings towards the plaintiffs in this case since the date of the final decree, August 26, 1935. Since the date of the entry of the final decree in this case there has been no change in the policy of the Public Works Administration. Since the date of the entry of the final decree in this case there has been no change in the aims and purposes of the Public Works Administration with respect to power—electric power.

My attention has been called by my counsel to what is known as Release No. 989, which was introduced in evidence in this case as Plaintiffs' Exhibit No. 35.

Q. Has there been any change in that policy, or that purpose, since August 26th, 1935? A. It wasn't written by—it was released by itself and as an entire document, taken in connection with subsequent releases and enunciation of policy.

Mr. FRANK: Objection.

The COURT: I think you can arrive at that, Mr. Robinson, if you ask if the purpose is correctly stated, first, and then ask if there is any change.

Mr. W. S. O'B. ROBINSON, JR.: I couldn't ask if it is correctly stated, because we can only investigate here something that has taken place since the final decree, and not go back of that.

The COURT: But you have to go back to answer whether there has been any change. You can ask if there has been any change in the purposes or policies of the Administration, in reference to the power rates before.

Mr. W. S. O'B. ROBINSON, JR.: And I understood him to say there had not been.

WITNESS: That is correct.

The COURT: That's what I understood him to say.

On page 122 of my book, I say, referring to undeveloped water power, "This wasted flow of water and the whole problem of cheap electricity in the United (657) States engaged the attention of President Roosevelt long before the people sent him to Washington as Chief Executive. Repeatedly he has emphasized the importance of a more thorough development of our water resources and a more widespread distribution of electric

power. Through PWA, he has begun a double-barreled campaign to secure both for the Nation. He has encouraged gigantic projects to tap some of our hitherto wasted water energy and he has instituted expert surveys to determine exactly what are equitable electric rates with a view to developing plans for future utilization of additional available water power".

Just below that, I say: "Acting under the Senate Joint Resolution of April 14, 1934, authorizing 'necessary funds to conduct an investigation regarding rates charged for electrical energy and to prepare a report thereon', the President allocated $300,000 from PWA funds to the Federal Power Commission to make a rate survey."

I say further: "The first report made by the commission gives a graphic picture of rates paid for residential electric service in all cities of 50,000 or more. It covers 191 cities, comprising 49 per cent of all residential customers, urban and rural, in the United States. Later reports will include all communities of 1,000 or more population in each State."

On page 124, I say: "An additional $400,000 was allocated to it from PWA funds"—that is, the Federal Power Commission,—"to prepare a 'comprehensive program of public works for conservation, development, control and utilization of water power for the generation of electrical energy and its transmission and/or distribution to consumers; and, in furtherance of the preparation of such program, to investigate, collect and record data concerning the present cost of generation, transmission and distribution of electrical energy; the data concerning the control and utilization of the National water resources including location, capacity, development cost and relation to markets of power sites; also data concerning the relation of the hydro-electric industry to other industries and to interstate and foreign commerce'."

(658) On the same page, I say: "In addition to the fundamental studies which are being made by the Federal Power Commission by means of its PWA financing, a grant of $100,000 was made at the President's suggestion to the National Power Policy Committee. This committee was established for the 'purpose of developing a plan for the closer cooperation of the several factors in

electric power supply, both public and private, whereby national policy in power matters may be unified and electricity be made more broadly available at cheaper rates to industry, to domestic and particularly to agricultural consumers; the committee is to be advisory to the President." The book clearly states the facts as to these matters.

On page 125 I state this: "Five hundred million dollars have already been allocated by PWA for definite projects to harness a portion of our potential water power. As we have seen, in the far Southwest, out of a deep canyon of the Colorado River, has arisen Boulder Dam; in the Northwest human ants are building the Grand Coulee and Bonneville dams on the Columbia River; in the valley of the Tennessee the war-time Wilson Dam has been brought into fuller use and the Norris and Wheeler dams are being rushed for completion in 1936. Mammoth power plants, with intricate generators large enough to supply whole cities, are being erected besides the dams; land is being cleared for huge reservoirs, and thick transmission lines are being strung up to carry to home and factory the low-cost electricity that is to come."

As to the statements contained in this book they are facts which I wrote as facts. The statements contained in the book are related as facts; that doesn't necessarily mean my own conclusions.

On page 126 of the book referring to the construction of dams generally, I say: "This activity is only the beginning of a national plan to increase the supply of electric power and to bring down its cost."

Q. And that is the fact, is it not—the activities to which you are referring in your book, the construction (659) of these plants, is part "of a national plan to increase the supply of electric power", and make it more widely available? A. Yes, I understand that the Administration is committing the crime of trying to decrease electric power rates.

I say further: "The desire to provide cheap electricity for the consumer has a social object since cheap electricity will raise, almost to a revolutionary extent, the standard of living in underprivileged homes". That correctly represents my views.

The COURT: He stated that all that correctly represents his views.

On page 129 of the book I refer to TVA and its activites and say: "This plan for social betterment is firmly grounded on the soil of good hard sense. It is almost as if the government said: We are going to harness the Tennessee and its tributaries by means of great dams and extract from its waters a gigantic supply of electric power. Then we shall distribute this power to as many people as possible at the least possible cost. Incidentally the cost here will serve as a yardstick by which to measure costs in other parts of the country."

On page 130 I state: "Altogether, it is expected that up to 300 million dollars will be spent in the Tennessee Valley in the course of the next six years, including power development and land renovation. PWA has approved loans and grants to cities which wish to build transmission and distributing systems so that they can make use of cheap TVA power. Ten million dollars have been earmarked for this purpose and one city, Knoxville, has been allotted $2,600,000 for the improvement and extension of its own system. Additional appeals for aid have been received from scores of towns and cities whose local governments are wishful for low cost TVA power, but which are unable to raise enough money to build a distribution system or buy out the existing utility that continues to charge unduly high rates."

On page 132 I refer to the Tupelo, Miss., project and say: "There the bills for electricity have been cut nearly in half since TVA replaced the private company."

(660) On page 134 of my book, I say this: "This is the picture in broad outline of TVA at the present time. Soon, it is to be expected, the idea will be extended to other sections of the country. Moreover, TVA—and this is one of the main reasons for its establishment—will provide a 'yardstick' for the measurement of similar rates in other parts of the Nation, with the result of forcing pretty generally a reduction of private utility charges."

This is in reference to TVA. All of this is in reference to TVA, that you have been reading for the last few minutes.

On page 135 of the book, I say: "This TVA enterprise has appealed particularly to the public imagination because of its magnitude and on account of the broad social concept that underlies it. Yet this is not the only front upon which the government, under its PWA program, has been advancing against those utility interests that have been exacting unconscionable tribute from the people of the United States for so many years."

This quotation correctly states the facts as I believe them to be. It correctly states my views as I believe them to be.

Q. And among those "utility interests that have been exacting unconscionable tribute from the people of the United States for so many years", you would class the Duke Power Company? A. I agree with you in that.

Q. No, I asked you if you would not so class the Duke Power Company? A. Yes.

Q. So the Duke Power Company was one of the utility interests to which you were referring, at least by inference, in that remark? A. It might have been. It isn't—strange as it might be, the Duke Power Company has not loomed particularly large in my horizon. It is one of the many power interests.

Q. I ask you if the Duke Power Company is not the only company that you make reference to by name? Did you name a single other one by name? A. I think I have a pleasant reference to Mr. Insull in my book, somewhere.

(661) Q. Oh, Mr. Insull. But here in this book, isn't the Duke Power Company the only power company? A. It may be. I may have given that name to make my point.

Q. Won't you tell me whether it is, or not, the only power company? A. I cannot answer that. I cannot say that it is the only power company. I have not been burning the midnight oil as counsel has recently.

In this chapter of my book I refer to and comment on utility companies which have sold securities to their customers and employees, which have issued securities generally on written-up ledger values, which have engaged in all sort of improper propaganda, and which have spent money for lobbying. As to whether I include

the Duke Power Company. in this class of utility companies I have no specific reference at all in those particulars. If the shoe fits it can put it on. As to whether I intended to put the shoe on it, the book speaks for itself. On page 135 of my book I say, "In addition to financing these and other great regional power projects, PWA has approved applications for loans and grants involving rural electrification".

On page 136, referring to loans and grants to municipalities for the construction of municipal plants I say, "Finally we have always given the private utility an opportunity to meet the city's proposed rates, and, if this is done, the city is afforded a second chance to lower still further its anticipated charges. But we have uniformly reserved the right to help a city which desires its own power plant even if the suggested rates will not be lower than those of the private utility". That correctly states my practice as Federal Emergency Administrator of Public Works in making loans and grants to municipalities.

Immediately following the above quotation I say, "It has been my position that there are definite intangible values flowing to a community that owns and operates its own utilities. A strong case can be made for the proposition that if the people of a community want to own their own public utilities and are able to finance them, they should not be denied that opportunity merely (662) because the rates necessary to be charged in order to pay overhead and to liquidate are equal to or perhaps even slightly in excess of rates already currently charged by privately owned utilities. We do not attempt to dictate to another what he may buy within his means even if we regard him as being extravagant. In addition to which, there is a considerable price which a municipality can afford to pay in order to rid itself of the domineering tactics and the corrupting influences too often resorted to in the past by private utility interests". This correctly states the P. W. A. policy.

As to whether I am in favor of municipalities owning their own plants, my personal view is that it depends upon the situation. In my own village of Winnetka, Illinois, we have owned and operated our own plant for a good many years with entire sanction and approval, including that of the greatest group of utility lawyers

living near Chicago. Some communities are so badly administered, their politics are so corrupt, they cannot be trusted to own and operate their own utilities, and in other instances they can.

In my book I discuss the protest which the Duke Power Company made before the Electric Board of Power Review, saying on page 141, that this protest "caused PWA to send the project to the Electric Power Board of Review for a thorough study". Col. Hunt was Chairman of that Board As to whether at the time the protest was referred to the Board I had already approved the allotment, and the President had already approved it, that would make no difference at all. We approved allotments in a good many instances where we rescinded the allotment thereafter on good cause shown. On page 142 of the book I say, referring to the hearing before the Electric Power Board of Review, "There it was discovered that the Duke Endowment, the Doris Duke Trust and the Duke Power Company, all creations of the late James B. Duke, the tobacco magnate, were so inextricably tied together that only a lawyer of unusual ability could unravel the legal skein into which they have been skillfully intertwined".

(663) In that statement I did not mean to charge that there was anything improper in the connection between these two trusts and the Duke Power Company. I merely meant that the Duke interests were clever enough to engage able counsel to represent them. On the next page of the book I undertake to give the stock ownership of these trusts in the Duke Power Company. I do not recall where I got that information. I think I must have gotten it from a report. I do not know. Just below the quotation last referred to I say, "The Duke Power Company was certainly letting its right hand know what its left was doing. It was making a practical application of the old adage that 'charity covers a multitude of sins'. Not only was it hiding behind the flimsy skirts of its own philanthropy, it was also raising a tremendous fuss over what would have been a loss of business of not to exceed one-third of one per cent if the Greenwood County project should go into operation". The sins I intended to charge the Duke Power Company with were charging excessive rates based upon its cost of production of elec-

tric power. It was the sin of excessive rates. I thought the Duke Power Company owed a duty to the public.

Q. And that is the sin you were charging it with when you said it was "hiding behind the flimsy skirts of its own philanthropy"? A. Well, it wasn't hiding its charity under a bushel.

On page 144 of my book I say, "Thus, as is often the case, a fine social enterprise was made to serve as a handmaiden to an anti-social purpose". The anti-social purpose to which I refer is the operation at excessive rates. I still believe now that the Duke rates are excessive. I haven't changed my opinion.

On page 146 of my book I state, "By January of 1935, twelve municipal power projects had been completed. Forty-eight others were under construction; thirty-four more had been approved by the power board, and about seventy-one were under consideration. The total amount allotted at that time for this purpose was $48,784,300".

This quotation correctly states the facts as of that date. In my book I refer to the accomplishments of PWA (664) and state that it has saved to consumers millions of dollars "through the lowering of rates by private utilities to meet the charges proposed by applicants for public power projects".

I say, "The rejection or withdrawal of some of the 200 applications that PWA did not approve was the result of this reduction of rates by the private companies to a point where there seemed no necessity or justification for a municipal plant".

Then on the next page I say, "These 'yardsticks' provided by both municipal and Federal enterprises are so valuable that they alone would warrant PWA's expenditures for power undertakings. The municipal projects have caused private utilities to adjust their rates downward in wide areas and the Federal projects have brought about rate adjustments over still larger expanses of territory". This quotation correctly states the facts.

Then in the last paragraph of this chapter of my book I say, "But more significant than the 'yardstick' quality of these Federal and municipal power projects is the fact that their development marks the beginning of an age of electrictiy for the United States—as age

which will make the mid-Victorian marvels of steam and gas seem primitive and crude. Once the tremendous locked-up reserve of electrical power in the streams and rivers and coal mines of the country has been adequately employed; once electricity as cheap as water, if not as free as air, is available to every householder; once equipment to utilize more generally the coming low-cost power has been perfected by the inventive genius of America, a magical and hitherto unimagined civilization will have dawned in the Western World". This paragraph correctly states the facts.

Q. Now, Mr. Ickes, what I have read from your book correctly states the Public Works Administration's national power policy, as applied to all loans and grants for power projects, does it not? A. The Public Works Administration's policy is incorporated in the passages that you have read.

There has been no change in that policy, as stated in my book, since August 26, 1935, when the final decree (665) was entered in this case, and no change in my purposes and aims as Federal Emergency Administrator in carrying out that policy.

The Public Works Administration has heretofore advanced Greenwood County, under the contract of December 8, 1934, $60,000, which I assume has been expended in the preliminary work in the construction of the project.

The suggestion of amending or changing the contract of December 8, 1934, so as to modify it in accordance with the contract of November 30, 1935, was made to me by my counsel. At the time that suggestion was made to me and as a part of the discussion between myself and my attorneys my attention was called to the record in this case. It was particularly called to the testimony of the witness Mr. Rose. The purpose in changing the contract was to bring ourselves within the ruling of the court so we could go ahead as speedily as we could with this project; this and others. Yes, I was concerned about the testimony of Mr. Rose. (I didn't think it represented the facts.)

I cannot say that I wanted an opportunity to answer the testimony of Mr. Rose. If that testimony had

not been in there at all in that precise form we still would have submitted the contract. This contract was called to my attention early in November, certainly within the first ten days or two weeks. No, my attention was not called to Mr. Rose's testimony when the matter was first called to my attention. I didn't read Mr. Rose's testimony until yesterday, and to the best of my recollection and belief I was not advised or told about it. No, I was not. Until yesterday I did not know what Mr. Rose had testified to, and had no information whatsoever about his testimony.

The bond resolution passed by Greenwood County in this case was prepared in Washington in consultation between counsel for Greenwood County and the attorneys for the Public Works Administration working it out together. The bond resolutions are in the record and will speak for themselves. I knew Greenwood County had entered into contracts for the sale of power, but I did (666) not know how much. (We did not approve rates. We are not interested in rates except insofar as our experts advised us that by charging those rates at which power could be sold they could liquidate their obligation to us. The rates set out in the bond resolution of the County are initial rates. There is no reservation of the right on our part to change those rates in the future. I don't know whether the contracts which Greenwood County made for the sale of power to be produced by the project were presented to anyone in the Public Works Administration or not. They were not presented to me personally. Our experts advised us that at that rate our loan would be liquidated. It was the same interest any banker would have in buying these bonds. We would not have entered into a contract if the rates had not shown a sufficient, prospective income, based on those rates to liquidate the loan. The rates as such were not approved by the PWA authorities. We knew that those rates were sufficient. If the rate were a lower rate applied to a larger sale of power which would have been sufficient in the aggregate to liquidate the obligation to the United States that would have been a satisfactory arrangement. On the other hand, if it had been a higher rate, applied to a lesser amount of power sold which would yield enough to liquidate the obligation of the United States that would have been a satisfactory ar-

rangement. We did not take into consideration the rates charged by the Duke Power Company in making this contract.)

RE-DIRECT EXAMINATION.

(667) Q. Mr. Ickes, under the PWA Act—under Title II of the National Industrial Recovery Act, two types of projects are provided: Federal and non-Federal, are they not? A. That's correct.

(Q. References were made to quotations given from your book with reference to the fixing of power rates, in connection—by the Federal Government. Do you care to classify the projects, with reference to the fixing of rates, in accordance with the classification I have just indicated? A. T.V.A. is a Federal project; Columbia River is a Federal project; Casper-Alcova is a Federal project; Grand Coulee is a Federal project. I don't recall what others were mentioned in the excerpts read by counsel.)

(Q. Did you intend, when reference was made to the fixing of power rates by the Federal Government, to refer to the fixing of rates of municipally-owned projects, to which loans and grants were made by the Public Works Administration? A. No.)

(Q. When you spoke,—I cannot quote your exact words—that charges were being made against the Administration that it was endeavoring to lower rates, did you refer to the Public Works Administration, or did you mean the National Administration, referring to the President—the party in office? A. I was referring to the National Administration and not the Public Works Administration.)

Q. In the case of the Greenwood County project, you would have made the loan and grant, regardless of your views as to whether the Duke Power Company's rates were, or were not, high?

Objection by plaintiffs on the grounds stated above and on the additional grounds that the *questions* calls for a conjectural conclusion by the witness and that the question is irrelevant and immaterial.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

(668) A. We would have made the loan and grant to Greenwood County, regardless of the rates, or our opinion of the rates, of the Duke Power Company, if Greenwood County had the legal authority to enter into the contract with us, and if Greenwood County could satisfy us that it could liquidate the loan that we made.

Q. Those were the considerations?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. They were.

RE-CROSS EXAMINATION.

As to whether the power policy of the Public Works Administration is a part of the National Power Policy I do not know. We have set up our own policy.

(669) At the conclusion of the reading of Mr. Ickes' testimony the book entitled "Back to Work" by Harold L. Ickes, was offered and received in evidence as Defendants' Exhibit 85. This exhibit is sent up with the record on appeal.

A copy of the loan and grant agreement of Nov. 30, 1935, between the Government and Greenwood County, offered and received in evidence as Defendants' Ex. 86, appears as an exhibit attached to Defendant's motion of Dec. 4, 1934.

G. R. BARKSDALE, a witness for the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I went before the Board of Review with a number of men from Greenwood County. The conference lasted about three days as I recall it. The first day, I believe, we met Mr. Hunt, Mr. Rau and Mr. Herring. There might have been some others. I did not go before the Board with this delegation on any other occasion than

this conference. (During the several days' discussion the question of reduction of rates was not mentioned.)

CROSS EXAMINATION.

This conference was, as I recall it, in July of 1934. That was after the Public Works Administration had already approved the loan and grant and was the only conference I ever attended.

RE-DIRECT EXAMINATION.

That hearing I attended was when the Government gave us the opportunity to reply to Duke in its appeal to the Board. They asked us to come there as to some figures.

RE-CROSS EXAMINATION.

The figures that we were asked to come there about were figures relating to the cost of the project. I was asked to be there as an engineer to support certain cost estimates, which I had made, covering the electric side of the project.

(670) F. W. CHAPMAN, a witness for the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I live in Greenwood, S. C., and have been there for about six years. I am Superintendent of the water and light plant at Greenwood. Prior to that time I was engaged in Camden and Laurens, S. C., in the same kind of work I am doing in Greenwood, and altogether in these three places have been engaged in this work for about fifteen years. I am familiar with the Buzzard Roost project in Greenwood County and fairly familiar with the Duke Power System having purchased power from them the six years I have been there.

(671) (In my opinion building the Buzzard Roost project would not materially affect the financial set-up of the Duke Power Company.)

F. W. CHAPMAN.

I have been in the partially completed steam plant of the Greenwood Cotton Mill. It is a 10-000 kilowatt steam and electric plant with an auxilairy ten thousand kilowatt unit. It is within several months of completion. I am not familiar with the steam plant at Clinton. (The only complaint we have to make as to the Duke Power Company's service is that their voltage regulation is not perfect for city operation. I took the matter up officially with a representative of the Company—Mr. Wiley of the Anderson district. The situation has not been corrected. The situation affects the consumer in that if the voltage is low the lights are dim and there isn't as much light for the money as the customer is entitled to. In a case of over-voltage the lights burn out too quickly and (672) the consumers have to purchase more bulbs. There is no way of holding the current at the correct voltage on a long-distance system without regulators. These regulators are very desirable.)

CROSS EXAMINATION.

(The only complaint I have is that the voltage regulation is not perfect for our service. This variation in voltage is usually over the week-end. I do not have our contract with the Duke Power Company but I have read it. I do not remember now whether there is a provision in the contract that the consumer will furnish the necessary devices for the voltage regulations. We plan to purchase regulators and can purchase them and correct this. They would cost between five and seven thousand dollars. As I understand the cause of the change in the voltage is that the mill load on week-ends with the Power Company is not as heavy as it is during the week and it becomes necessary for them to readjust the voltage they hold at the generators. The change in voltage is due to the load on the system. As to whether we have to have devices to steady that or to prevent these variations, ordinarily I presume that Duke would control that at their generating station.)

At the present time the town of Greenwood is purchasing power from the Duke Power Company and has been doing so ever since I have been at Greenwood. While I was at Laurens the town did not purchase from Duke Power Company but from the Reedy River Power Com-

party. Since Duke bought Reedy River, Laurens has purchased from Duke. (In my honest judgment I say if the Buzzard Roost plant was built I do not think that would materially affect the setup of the Duke Power Company. I understand that if the Buzzard Roost plant is constructed practically all of the contracts which they have for the sale of power are with present consumers of the Duke Power Company. I cannot say how much (673) annual revenue this plant would take away from the Duke Power Company except for our own corporation. The Town of Greenwood pays the Company between four and five thousand dollars a month at the present time—about $60,000.00 a year. It is true that they would lose that right away. $60,000.00 is to me personally a material sum of money. I have never seen the contract, but it is my information that the Town of Laurens would stop buying from the Duke Power Company and buy from Buzzard Roost. When I made my statement about the Buzzard Roost plant not materially affecting the setup of the Duke Power Company I made it with regard to Greenwood County. I didn't realize that Newberry and Laurens were included in that question and did not have that loss in mind.

Q. Well, if as a matter of fact, this plant would immediately take away something over a quarter of a million dollars a year from the Duke Power Company, from the revenues of that company, and leaving out of account any additional and subsequent damage or loss it would sustain, why you wouldn't say that that was a mere trifling amount of money, would you? A. I don't know the income of the Duke Power Company.

Q. Well, two hundred and fifty thousand dollars is a substantial amount of money, isn't it? A. Yes, sir.

Q. For anybody to lose? A. No answer.)

(674) CLARK FOREMAN, a witness for defendants, being first duly sworn, testified as follows:

I am Director of the Power Division of the Public Works Administration, and have been since August 1, 1935, when the division was created. The Power Division examines all applications for the generation, transmission and distribution of electricity and gas and makes

recommendations on these applications to the Administrator. The Power Division has three technical sections. One is the Finance Section, which examines the applications from the point of view of the security of the loan, if a loan is involved; the Engineering Division which examines the applications from the viewpoint of the engineering soundness of the proposed project; and the Legal Section, which examines the applications from the standpoint of their legality and also handles any litigation that may involve power projects.

That is the organization of the Division as it was from the beginning, as I organized it, and as it is today. During the time I have been Director something more than five hundred applications for gas and electric projects have come under my supervision and we have had a great deal of correspondence with respect to these projects. All letters that go out from the Public Works Administration are signed "For the Administrator". But those in the Power Division that go out over my signature are signed "Clark Foreman, Director of the Power Division, for the Administrator". There is an order in PWA or an order from the Administrator saying that all letters must have under the signature the words "For the Administrator". If they have that, it is tantamount to saying it is an official letter.

(675) Before our Division recommends applications for loans and grant for power projects to the Administrator, we must have assurance that the projects are legal, as certified by the Legal Section that they are legal, by the Engineering Section that they are engineeringly sound, and by the Financial Section that any loan which might be proposed would be financially secured.

If the project is a competitive project, that is to say, if it would be competitive with the existing private utility were it built, then we would have to assure ourselves that the rates of the project would be sufficiently low to secure business and sufficiently high to pay out the bonds which we would lend them, to secure the loan in other words, the principal and interest, amortization of the loan.

The COURT: In other words, if you built it by letting them have the money or the credit, whichever it is,

to build the thing with, why you would have some interest in being repaid? A. That is right.

Q. And you don't want to give the power away to these people that need the help, so cheaply that they wouldn't be able to pay the bonds back? A. Well, if revenue bonds we have to have that reasonable assurance, which the Act provides.

The COURT: Exactly.

Mr. W. S. O'B. ROBINSON, JR.: And, further that the rates have to be sufficiently low to get the business? A. I said low enough, low enough to get the market.

In the case of a loan secured by general obligation bonds we would have no interest in rates, either of the plant to be built or of the private company that might be operating there. Nor do we have any interest in rates in cases where a grant only is applied for and the municipality arranges for its loan from other sources. We do not give consideration to the rates of the proposed municipal plant or of the existing private utility for any other purpose than that of reasonable security.

Q. Tell us whether or not you give any consideration to this question of so-called social desirability of a project?

(676) Mr. ROBINSON, counsel for plaintiffs: We object on the ground that under Mr. Ickes' testimony this witness is disqualified to testify as to the policy, etc., of the Public Works Administration. Mr. Ickes testified that no one except himself and the President had any right to speak for the Public Works Administration.

The COURT: Well, there is certainly great force in your objection to the testimony; because Mr. Ickes did testify most forcefully that he and he alone, unless it were the President of the United States, could state his policy, and he repudiated Mr. Rose's testimony altogether. I think, however, the testimony is admissible.

A. Under ordinary circumstances we assume social desirability when the application comes in from the city. If a protest is made on an application and it is pointed

out that the social desirability is lacking, then we carefully study that protest, as we do all protests. But our invariable rule is that social desirability of a project is to be determined by the city itself, that is to say, the applicant.

Since I have been Director of the Power Division I have had occasion from time to time to discuss questions of policy and problems that arise in connection with power matters with the Administrator. I have not changed my policies or considerations that I give to municipal projects as Director of the Power Division.

Well, I am familiar with the terms of the contract that was executed on November 30, 1935, with Greenwood County. I am generally familiar with it, I have read it. It is typical of all our contracts in revenue bond cases. I was Director of the Power Division at that time.

(677) As to whether I am familiar with the form of the contract in effect between the Public Works Administration and the City of Sandusky, Ohio, which was introduced in evidence as Defendants' Exhibit 84, I am familair with it as a general form of contract in use by the Public Works Administration in cases involving general obligation bonds. Shortly after I became Director, we changed, I believe, all of the existing contracts that were on power cases which were not at that time under construction. The change was to the form used in the Greenwood County case or the Sandusky case.

Since I have been Director of the Power Division I have not, as far as I know, had any negotiations with the Duke Power Company with respect to the Greenwood County allotment. There may have been a protest filed but as far as I can remember there has not. At the present time there is no one else in the Public Works Administration that is charged with the handling of power applications.

The application of Sandusky, Ohio, in respect to which plaintiffs have introduced in evidence certain correspondence as their Exhibits 67, 68 and 69, came under the jurisdiction of the Power Division after I was appointed. Shortly after I was appointed Director of the Power Division letters came to my attention from the City of Sandusky, asking that action be taken immedi-

ately on their application. And I looked into the matter and found that it had been approved by the three existing divisions which were established which examined power projects before the creation of the Power Division and had recommended the allotment for this project. An allotment was made in December, I am not sure of the date, 1935, the culmination of the matter being the loan and grant agreement with the City of Sandusky. (Defendants' Exhibit 84.)

As to the application of the City of Tecumseh, Mich., referred to in Plaintiffs' Exhibit 60, I was advised by the State Director of Public Works Administration for the State of Michigan that the City of Tecumseh had entered into a five-year contract with the Power Company and was no longer interested in the (678) application, so the application was rejected.

The application of the City of Washington, Kan., in respect to which plaintiffs introduced in evidence through the witness Vennard a letter as their Exhibit 52, was rejected because the general obligation bonds of that city did not afford reasonable security.

Q. Now was that objection made before or after you became Director of the Power Division? A. I will have to look into this to find out. I can tell you.

Mr. ROBINSON, counsel for plaintiffs: I suppose the reasons for rejecting appear in the dockets. May I ask the witness about that?

The COURT: Yes.

Mr. ROBINSON: Do they appear in the dockets of these cases?

The WITNESS: That is right. And the applicants have been so notified.

Mr. ROBINSON: That being so, we object to this evidence as not being proper, because it is a matter of record.

The COURT: Have you got them here, Mr. Witness?

The WITNESS: Your Honor, I am not sure that that docket was brought down here. Washington, Kan., I found was one that was *was* rejected before I was Director of the Power Division and I am not sure the lawyers brought it down.

Mr. ROBINSON: I don't want unnecessarily to en-

cumber the record; but this gentleman is referring to an application as having been refused because of certain facts and we don't know when it was refused, whether it was during his regime or whether he is the one that refused it.

The WITNESS: I have just a list here, I admit that is all I have, just this.

(679) The COURT: I don't think he has gone too far; I will not strike it out. Was there an answer to that last question?

The WITNESS: There was no answer because I don't know. I have since looked it up and I found that it was rejected before I was Director of the Power Division. You see, I have a list as of January 1, 1936, which gives me the status of the projects at that time.

The application of Plainview, Tex., about which Col. Carter testified, was withdrawn. The present status of the application of the City of Dowagiac is that there is an allotment pending and Defendants' Exhibit 83 is the form of agreement in existence between the Public Works Administration and the City of Dowagiac. The application of the City of Rector, Ark., was withdrawn by the City. As to the application of the City of Kennett, Mo., after that decision out there we sent them a new agreement, but according to my records the City has not signed it. As to the City of Petersburg, Ill., referred to by Mr. Vennard, I have only the records with me which show that the allotment at one time was made, but it doesn't exist on the latest list which I have, which I take to mean it has either been rejected or withdrawn in the meantime, but I don't know.

An allotment was made to the City of Concordia, Kan., but was later rescinded after suit was instituted by the local power company which terminated unfavorably for the City.

As to the application of the City of Stigler, Okla. I only have a record that it has been withdrawn.

Middleboro, Ky., had originally an allotment for a generating plant and a distribution system. As a result of the local election recently held, the City has decided to buy its electricity from the Tennessee Valley Au-

(680) thority and not to build its own generating plant,

and therefore has amended its application to us and the allotment has been changed accordingly.

As to the City of San Angelo, Tex., I only have a record that an application was in before the Public Works Administration at one time, and the application has now been rejected or withdrawn. That was done prior to the creation of the Power Division.

As to the application of the City of Marlin, Texas, the records show that this application is considered as withdrawn upon the official request of the City that any further action on it be suspended.

As to the application of Mount Dora, Fla., I will state that this application was disapproved by the Finance Board on the ground that the bonds offered did not constitute reasonable security. It was also disapproved by the Engineering Division and after learning of these disapprovals the City of Mount Dora entered into a five-year contract with a local utility company and the application was suspended.

As to the application of Morenci, Mich., this application was either rejected or withdrawn some time previous to January 1st, 1936, and I think before the Power Division was created.

As of January 1, 1937, all the non-Federal projects of PWA amounted to 9389, or in money, $1,480,612,543.00. Of these non-Federal projects 282 were power projects. Of these power projects we have estimated 92 involved competition with existing private companies, using competition in the broadest sense and meaning alleged competition. The total amount of money involved in these 92 projects is $27,339,947.00. This figure does not include allotments for the large hydro-electric projects such as Santee-Cooper and the Nebraska project. It includes projects such as the one here under discussion and other municipal projects where there would be a question of replacement or actual competition with the existing private utility. We do not consider the Nebraska and Santee-Cooper projects as competitive in the (681) same sense, there being no assurance that there is going to be any actual competition on those projects. Also most of those projects include other factors than power production such as irrigation, flood control and navigation features. There are seven of those large hydro-electric projects and the total amount of money allotted to them amounts to $54,025,000.00.

CLARK FOREMAN.

Mr. SHER: May it please the court, with respect to the testimony of this witness as to the projects that the plaintiffs introduced, we offer this without waiving our rights as to the admissibility of the evidence.

The COURT: All right. Yes, sir, you contend we should not have gone into these other projects at all, but in that the Court overruled you and went into it you say this evidence is admissible in reply, without waiving anything as to your original position that it should not have been introduced. The Court understands that.

CROSS EXAMINATION.

I became Director of the Power Division on August 1, 1935. As to the status of certain projects including the Plainview, Texas, project, it was our information that this application had been withdrawn as the result of an agreement made between the existing utility and the City. On the basis of that information we withdrew it from our records. I do not know that back of the withdrawal of the city was the execution of a contract between the existing utility and the city at rates which were as low as those in the proposed application. I do not know that yet. I am not sufficiently informed about that project. I only know we were informed that the Power Company granted some rate reductions. What those were I have never been informed.

I heard yesterday in the testimony that in the case of the application of the City of Dowagiac, Mich., the Power Company first reduced its rates to those stipulated in the application for the PWA plant, and that thereafter the rate of the PWA plant was lowered. I looked in the records and I think there is a letter saying the rates of the power company were so lowered. However, there was no action on the application, and therefore they changed nothing so far as we were concerned.

Q. That is when the power company lowered their rates there was no action at that time? A. The city did not withdraw its application.

Q. And there was no action on the application either? A. So far as we are concerned whatever the power company did meant nothing, so long as the city kept its application before us.

Q. The fact is at the time when you found from the inspection of the files that the power company had put in the lowered rates, no action was at that time taken by PWA on the application? A. No action was taken.

It was some time later that the allotment was made. When I came in as Director of the Power Division there was some question about the legality of the loan and as soon as that was cleared up the allotment was made. I said so far as I can remember I had no negotiations with the Duke Power Company in connection with the Greenwood project. I certainly had no correspondence with them as to rates. I am aware that the Greenwood Project was in litigation a considerable time before I became Director of the Power Division.

The Sandusky, Ohio, project is one involving general obligation bonds.

When the question of revenue bonds was involved, in passing upon an application we had to be sure that (682) there was sufficient revenue coming in. I had to be assured that the loan would be reasonably secured as provided by the statute.

We have applications before us in which the applicant presents contracts in advance for ninety per cent in that town. Well, now, it didn't make any difference, as they had the contracts, whether the rates were lower or not. If they have the contracts and if the people have to pay higher rates I don't care, just so the loan is secure.

As to whether in those cases that I last mentioned we ascertained that the proposed plant had signed up enough of the customers of the existing utility to insure its competitive success, I say that we don't look into the present trading situation. As long as they are customers we do not care whether they are buying electricity now or not.

As to whether in case of duplicate plants we understand and assume where contracts for customers are presented that they are customers not served by an existing utility, I would like to refer you to the fact that in the existing application for Greenwood County a great many mills in that County who are not now trading with the Duke Power Company have signed an agreement to buy electricity from the County.

In answer to your question as to whether in our

general practice we assume, or at least are not ignorant of whether customers signed up for a proposed duplicate utility are customers of the existing utility, all I can answer again is that we have to be assured the loan is reasonably secure and the security of the loan must depend on the individual situation. I would not think that the normal success of a duplicate competing plant in a municipality depended absolutely upon its rates. (683) Usually I should say it did.

If the proposed municipal utility financed by PWA, adopts lower rates than the existing utility, the usual thing would be that the one which had the lower rate would get the majority of the business. I do not know that if a plant built by PWA funds puts in a lower rate, the existing utility will have to meet that rate or go out of business. As to whether the private utility might continue to compete at a higher rate we have been assured in a great many cases that no matter whether the municipality puts in a municipal plant or not a great many customers will stay with the private utility regardless of the rates. No, I would not say that it is my common experience that a great many customers of an existing privately owned utility are determined to stay with the company regardless of how high its rates are. But many times we have received letters from the power companies saying a municipal plant could not pay out because regardless of the rate the customers would stay with the private power company.

Where a loan is involved the Financial Section considers the financial soundness of the application for a project. If the project can finance its loan outside of the Public Works Administration we encourage that.

I have answered the question as to whether social desirability is a separate thing to be considered and determined. We assume when a city makes its application, that covers the social desirability, but if a protest is made by a power company or others that the application is lacking in social desirability we examine that protest and in some cases even refer it to the city for their information, if we think something has escaped their attention which has been brought to us by protest.

In all cases where we are making a loan we examine engineering soundness, financial soundness and legal (684) soundness. In all cases we assume social desir-

ability is involved. We assume its existence if the city says it exists, and outside of that assumption we never give it any consideration unless a protest is made, in which case we refer it to the city. Yes, we consider social desirability if it is raised in a protest.

Q. On May 19, 1936, Mr. Foreman, in the case of Texas Utilities Company and others in the Supreme Court of the District of Columbia, Secretary Ickes was asked these two questions and made these two answers, page 1472 of the transcript:

Q. "Mr. Secretary, dealing specifically with an application for a duplicate and competing municipal power project, what was the element of social desirability which governed the action and decision of PWA? A. Well, there might be several. It might put the municipality in the position of being able to supply current to its citizens at a lower rate; the city gives employment in construction and in operating the plant and it might have the effect of removing from the hand of the municipality the heavy and in some cases corrupt hand of a public utility."

Q. "Were those all criteria which PWA considered in determining the social desirability of an application for a loan and grant for competing municipal plant? A. They were proper to be considered. I think in a general way they were considered."

Mr. W. D. ROBINSON, JR.: I would like to interrupt before you finish.

Mr. JACKSON: Let me finish.

Mr. D. W. ROBINSON, JR.: I don't believe it is competent to get Mr. Ickes' testimony in this way, and of course if the question is read it is in. We of the county want to object to this as hearsay.

The COURT: You mean in light of the present situation he can't cross examine him about his superior's statement?

Mr. D. W. ROBINSON, JR.: I don't believe he can, your Honor.

The COURT: I am not saying he can.

Mr. D. W. ROBINSON, JR.: His superior has been on the stand in this case and has testified. Now there are

probably portions of Mr. Ickes' testimony in the Alabama which the plaintiffs might consider more favorable to their view than the testimony here. There are probably other portions which we might think more favorable to our viewpoint. I am not very familiar with his testimony there but I don't believe that Mr. Ickes' testimony taken in the Alabama case can be introduced in this case by asking this witness whether he agrees or disagrees with it or some other formal question after reading Mr. Ickes' testimony. It is hearsay. Mr. Ickes has been on the stand and had an opportunity to be examined fully in this case.

Mr. JACKSON: I don't understand when a witness is confronted with something on cross examination that it becomes evidence expressed to the extent that he accepted, and therefore I don't think that the objection Mr. Robinson has made—

The COURT: Yes, sir, but let's see if he isn't right to this extent. Your question was didn't Mr. Ickes testify so and so and then you proceeded to give both question and answer as it appeared in that case, don't you see, so that you were getting to the Court not only the question that the attorney engaged in the trial of that case up there asked Mr. Ickes, but getting his response to the question in here bracketed under your question, "Didn't he testify so and so".

Mr. JACKSON: I expect I am in error somewhere, but I don't catch it.

The COURT: Isn't this right? Mr. Robinson says this. He says you are asking this witness to compare his testimony with Mr. Ickes', his superior's testimony in another case up in Washington, and in order to do that you asked him if Mr. Ickes testified as follows. Then you read the question counsel asked him up there and before he answers, before anybody else answers, you read Mr. Ickes' response to it, thereby getting Mr. Ickes' response out here today, whereas if he were present in Washington to object he would just as soon as the question was asked and before Mr. Ickes answered. He is correct on that.

Mr. JACKSON: As I understand it if I had a written statement that had never been given in court under oath by the superior of this witness I could show it to him and ask my question not to prove it, but—

The COURT: You asked him how he reconciled his present testimony with that.

Mr. JACKSON: What I intended to ask was whether or not he challenged the truthfulness of what Mr. Ickes said in that testimony.

The COURT: I don't see much difference between challenging the truth and reconciling.

Mr. JACKSON: If I understand what I am doing, your Honor, I am not offering Mr. Ickes' testimony at all. As I see if I could read all this and it wouldn't amount to anything except it would have unfortunately wasted the time of the Court, unless this same witness said he agreed with it and its force or effect is because this witness says, "I agree with it", and to that extent he makes it his testimony, and to the extent he makes it his testimony it is admissible in this case. The point is the only way I can show the statements were made is by offering that part of the transcript in evidence.

The COURT: Well, if this witness doesn't know whether he testified to that or not he can say so.

Mr. SHER: Doesn't he have to first show that Mr. Ickes did make those statements?

Mr. JACKSON: I assumed I could identify this part of the transcript for identification and it being proved that it was a true part of the transcript I could use any part of it and in view of the fact that the counsel in this case, including Mr. John W. Scott, Mr. Dempsey and Mr. Sher were counsel in that case, I don't think there would be any question of authenticity.

The COURT: Well, I am going to let you ask him that question and if they want to ask anything more they may have the right to do it.

Mr. SCOTT: May I make a suggestion? It seems to me the process is in the nature of an attempt to read into this record the testimony of this other witness. It isn't impeachment of this witness. There is no foundation laid.

The COURT: Of course it is not impeachment.

Mr. SCOTT: It seems to me what he should be permitted to do and only be permitted to do is read the substance of this answer possibly.

The COURT: Go ahead with what you are doing. I am not going to let either side get out of bounds on that proposition. Go ahead.

Q. Do you agree with Mr. Ickes' testimony as to the elements of social desirability which were considered by PWA in passing on competing municipal plants?

Mr. SHER: We object to the form of the question. It is improper cross examination.

The COURT: I will have to overrule your objection since I have had a minute to think about it. It is so intimately connected with direct duties of this witness to begin with, it is so intimately connected with other testimony in the case that it is perfectly proper to avail yourselves of that record in order to cross examine this witness intelligently, and I think it is all right and any use of that document that is so intimately connected with previous testimony in this case will be permitted. Your objection is overruled. Go ahead.

A. I would not like to attempt to agree or disagree with the Administrator on the power policies. I can speak only for the Power Division and the standards we use are those I have described.

In what I have said I have spoken only for the power division. I do not claim to have the right to write the policies of the Public Works Administration. I do not (685) claim any final authority upon the approval of loans and grants for competing municipal electric projects. I claim only the authority to establish standards or criteria. The criteria I use in the Power Division are those I set up. I have no control over those, in addition thereto, which may be used by the Administrator.

Plaintiffs asked to have marked as Plaintiffs' Exhibit 74 for identification a letter dated October 22, 1935, addressed to John M. Wright and signed "Clark Foreman, Director of Power Division for the Administrator", which was produced by counsel for the defendant, H. L. Ickes.

The WITNESS: Plaintiffs' Exhibit 74 for identification is a copy of a letter I wrote and I presume it was mailed.

RE-DIRECT EXAMINATION.

The applications of the City of Marlin, Texas, and of Tecumseh, Mich., were in suspense when I became Director of the Power Division and they were disposed of after. Before this letter of October 22, 1935, marked for identification Plaintiffs' Exhibit 74, was written, we had received an application from the City of Eldon, Iowa. After the application came in we received a protest from the Iowa Power Company in which the statement was made that the rates proposed in this town were, as I remember it, highest of any town of that size in the State of Iowa. The Power Company also made other allegations as to the engineering soundness of the project and other things. It mentioned particularly the matter of rates and said that the city would be much better off if they bought power from the Power Company than if they built for themselves. I thought that might have escaped the city's attention and we passed the information on to the city for whatever action they wanted to take. That was the latter part of October, 1935.

(686) The letter you show me, marked for identification Defendants' Exhibit 87, is a letter I received from the City Clerk of Eldon, Iowa, in reply to my letter of October 22, 1935.

The defendants then offered in evidence this letter from the City Clerk of Eldon, Iowa, to Mr. Clark Foreman, dated October 24, 1935, as Defendants' Exhibit 87, to show the course of the application. The letter which was admitted in evidence is as follows:

CITY OF ELDON

Wapello County, Iowa.

October 24, 1935.

Received 10/28/35.
Power Division

Mr. Clark Foreman,
Director, Power Division, PWA,
Washington, D. C.

Re: Docket Iowa—1345
Eldon Light Plant

CLARK FOREMAN.

My dear Sir:

In reply to your letter of October 22, last evening we received a report from our engineers (Young & Stanley of Muscatine, Iowa) in which they presented their estimates of the size and costs of the equipment necessary. This was made after a survey of our demand load, consumption, etc., over a period of time.

The engineers feel the ideal set-up for us is three 150 HP engines, which would give 300 HY "dependable" at all times, and at the same time be the most economical in operation, as our load could be carried with one engine during about 12 hours of the 24.

However, they feel that bids should be asked on three bases, namely: (1) two 300 HP (2) one 225 and one 300 HP and (3) three 150 HP.

(687) Under this arrangement a new building would be erected, at a cost of about $5,000, which could be done and still keep within the limits of our proposed bond issue. It is extremely doubtful, according to the estimates, if sufficient money can be made available for either set-up #1 or #2.

I assume your estimate of the cost of generating, including the debt service, which is set at 2.45¢ per KWH, is based on the operation of the two 300 HP engines and also on the cost price, which our engineers estimate to be about $5,000 above the available funds. Their estimate based on three 150 HP and liquidating the debt in 12 years is 1.8¢ per KWH, which is .5¢ less than we are now paying the private utility.

In regard to the reduction in rates suggested by your letter, the Council has made some estimates in this regard, and I can take the liberty of quoting the present rates for various classes of service and also the tentative rates.

In this particular, many friends of the municipal plant idea are opposed to any rate reductions until such time as the plant is fairly established.

Present Rate		Proposed Rate	
Residence		Residence	
First 25 KWH.....	12¢	First 35 KWH	10¢
Next 25 KWH	10¢	Next 35 KWH	08¢
Next 50 KWH	08¢	Next 30 KWH	06¢
Next 100 KWH	06¢	Over 100 KWH	04¢
Over 200 KWH	04¢		

Optional Residence		Optional Residence	
First 50 KWH	08¢	First 50 KWH	08¢
Over 50 KWH	04¢	Next 50 KWH	04¢
		Over 100 KWH	02¢

(688) Optional Business		Optional Business	
First 50 KWH	08¢	First 50 KWH	08¢
Next 50 KWH	06¢	Next 50 KWH	06¢
Over 100 KWH	04¢	Next 50 KWH	04¢
		Over 150 KWH	02¢

Power		Power	
First 25 KWH	08¢	First 25 KWH	08¢
Over 25 KWH	04¢	Next 75 KWH	04¢
		Over 100 KWH	02¢

We feel this proposed reduction will benefit the extremely small user and tend to stimulate the use of major appliances by those on our Optional Resident rate, without material injury to our revenues.

Very truly yours,

(Signed) JOHN M. WRIGHT,
City Clerk.

914943 Oct. 26, '35.

The WITNESS: After the receipt of this letter we accepted completely the City's desire in the matter and made the allotment, entering into a loan and grant agreement with the City of Eldon, Iowa.

The defendants offered and the Court admitted in evidence the following exhibits, copies of which are hereto attached.

Defendants' Exhibit 88, being resolution of the Greenwood County Finance Board of November 30, 1935.

Defendants' Exhibit 89, being resolution of the Greenwood County Finance Board of December 2, 1935.

Defendants' Exhibit 90, being a statement of the annual power sales of the Duke Power Company and the annual gross revenue therefrom.

Defendants' Exhibit 91, being a statement of the kilowatt hours generated annually by the Duke Power Company.

(689) Defendants introduced the testimony of Emmett I. Davis taken before Judge Watkins in Spartanburg on December 12, 1935, as follows:

EMMETT I. DAVIS, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a member and Secretary of The Finance Board for Greenwood County, and have been closely associated with this project from its beginning to date.

(During the summer of 1933, Mr. D. T. Duncan suggested to the Finance Board for Greenwood County that the County make application to Federal Government for loan and grant with which to build a County Hydro-Electric Plant on Saluda River. Finance Board asked Mr. Duncan to make up an application, which application was unanimously approved by Finance Board for Greenwood County and filed with the State Office of the Public Works Administration in Columbia, S. C., November 16, 1933. Neither the Public Works Administration of the Federal Government nor any other branch or representative of Federal Government, so far as I know, solicited or suggested the filing of this application. Greenwood County has taken the initiative in filing application, pressing Public Works Administration for an allotment and in litigation involving the (690) case.) The Revenue income table set up in original application was based on a rate schedule made up by D. T. Duncan and are substantially the same rates as were later approved and incorporated in Bond Resolutions. The Finance Board fully understands that it has the authority to change rate schedules either up or down and that rates charged must be sufficient to operate plant and to meet bonded obligations. The Finance Board is of the opinion that present rate set up is sufficient to liquidate loan.

Greenwood County has not heretofore and does not intend to confine its efforts to sell Power to Duke Power

Company customers alone. Greenwood County hopes to sell the major part of its primary current output to municipalities, rural sections and small industries in Greenwood, Newberry and Laurens counties and surplus primary and secondary to large industrial users. The undeveloped rural load in the three counties plus the developed industrial load in Greenwood County, not now sold by Duke Power Company, is sufficient to liquidate loan at proposed rates. The principal motive of the Finance Board for Greenwood County in fostering this project is to make rural electrification possible at rates the rural populace can pay and to supply municipal owned distribution systems current at rates substantially lower than they are now paying. (I know of no instance either in correspondence or in interviews where the Public Works Administration or any of its employees or agents have said or intimated that the direct or implied object of this loan and grant was or is for the purpose of forcing down Duke Power Company rates.)

CROSS EXAMINATION.

The resolution of November 30th, 1935, is an authorization to the proper officers of the County to execute the contract of November 30th, 1935. The resolution of December 2, 1935, re-adopts practically the same rates (691) for the sale of power which were included in the original bond resolution. They are substantially the same rates at which the County has made contracts for the sale of power from this project. I think some of the sales probably don't go into detail. The record in this case shows the amount of power which the County has already contracted to sell, and to whom it has sold it and the rates, etc. None of those contracts for the sale of power have been changed.

(692) EMMETT I. DAVIS further testified on the retrial as follows:

DIRECT EXAMINATION.

I am Secretary of the Finance Board of Greenwood County and as such have had charge of the cor-

respondence of the Board with the Public Works Administration in connection with the Buzzard Roost project. (I have received at no time since the application has been filed or prior thereto any letter from anyone connected with the Public Works Administration with regard to the rates of the Duke Power Company. I have not received at any time from anyone connected with the Public Works Administration a suggestion that Greenwood County withdraw its application in exchange for the lowering of rates in the territory served by the Duke Power Company.)

I have been to Washington in connection with this application, allotment and contract on several occasions. I went up there between the time the application was filed in November, 1933, and the allotment was made on June 19, 1934. I was there just after the Duke Power Company's protest. I think about the latter part of July, 1934. Mr. Barksdale, Mr. Duncan, Senator Nicholson, Mr. Sweeney and myself made up the party. We conferred first with Colonel Hunt and were referred by him to Mr. Rau and we conferred with Mr. Rau and Mr. Herring for approximately two days. This was in the latter part of July during the time the Duke Power Company's protest was being considered. (I do not recall a single instance in which either Colonel Hunt, Mr. Rau or Mr. Herring referred to the rates of the Duke Power Company. At no time did any of these gentlemen suggest that the County withdraw its application in exchange for a lowering of the Duke rates.)

Mr. Duncan, the County engineer, prepared the rates for the Greenwood County project. The general (693) rate was set up in the original application and filed November 16, 1933 in Columbia. The rate we still have in effect is the same rate that was in the original application before it was ever approved. The rate was broken down and detailed schedules set up later but the average rate is practically the same. (No one connected with the Public Works Administration, either by letter or in oral conversation, suggested a change in those rates.)

In our interview with Mr. Rau we were called for the purpose of substantiating our estimates on the project. He expressed some doubt, as I recall it, as to whether or not the rate was quite sufficient to liquidate the project, but after two days'

conference he was satisfied. He did not make a suggestion as to the rates, but just expressed the general statement that he had some doubt about the rates being sufficiently high to liquidate. Our original plan was to sell in one County and then broadened later into a three County plan. We have negotiated with the City Councils of Newberry and Laurens, our contracts for power being with those cities, not with the counties. Those counties have not created any county agencies specifically for this purpose, as we have.

(The principal motive of the County in making this application was to be able to supply electricity to the municipality and the rural areas at a cheaper rate than we thought we could otherwise do.) The plant will generally serve municipalities, rural areas and small industries. We have some secondary contracts with a mill, but we won't have generating capacity to take on a great many more industries of that size. We have one contract with a textile mill, that is Mr. Abney's mill, the Grendel. That is for secondary power. It is our thought that with the increase in consumption of power it will be only a comparatively short time before the municipalities and rural areas will begin to absorb the (694) output of the plant. We do not have enough power to sell any appreciable amount of textile industries.

(Assuming that our plant is built and we sell to the customers that we have tentative contracts with now, that would not have any effect, as I understand the setup, upon Duke's high tension lines in our areas except probably the dismantling of some sub-stations. I should think that such sub-stations or transformers could be transferred and used at another place.)

CROSS EXAMINATION.

The rates we set up in the original application with the exception of the detail of later breaking them down are in substance the same rates which have been set forth in the two rate resolutions of the County and are the rates at which the County now proposes to sell the power if the plant should be constructed. There has been no change. The Public Works Administration has never made any objection to those rates so far as

I know except the suggestion I mentioned a little bit ago when in July, 1934, after the Duke Power Company made its protest, they called on us to substantiate our estimate of the cost of construction in the light of the protest and asked us to reaffirm our estimate of the cost.

When we first went to see Mr. Rau, at the beginning of the interview he expressed some doubt as to whether we could operate at the rate set out in our application in view of the showing as to possible cost, but after going into it he did not raise that question any further. He evidently was satisfied, so far as I could tell, that the County could operate at the rate set forth in its original application.

The Exhibit which has been offered in evidence as Plaintiffs' Exhibit 18, sets forth the customers with whom the Buzzard Roost plant has heretofore made contracts for the sale of its output and a list of prospec-
(695) tive customers in the Buzzard Roost area to whom the plant might be able to sell the remainder of its output. Among the list of customers we have "Rural Electrification—500,000 kilowatt hours; and among the prospective customers we have "Rural Electric customers—1,000,000 kilowatt hours". We estimated that the customers with whom we have made contracts would take 15,200,000 kilowatt hours a year, not including the secondary. All of these customers included in the total of 15,200,000, except the 500,000 kilowatt hours for rural electrification, are now customers of the Duke Power Company.

Our engineers have agreed on an estimate that the total output of this plant in primary power is about 30,000,000 kilowatt hours. The contracts we have are for approximately one-half the output. The estimate at that time was that of the other half, or approximately 15,000,000 kilowatt hours, one million kilowatt hours might be sold to rural electric customers, and the other prospective customers are those given in that list that was set up in the application appearing on page 341 of the record in the Supreme Court.

Re-Direct Examination.

Since the time this statement, appearing as Plaintiff's Exhibit 18, was made upon September 13, 1934,

we have some prospective contracts with one of Mr. Abney's mills, the Grendel, for the sale of primary power. My estimate of what we would sell him annually for that mill would be a guess, but it would be a considerable quantity. At the present time that mill is not a Duke Power Company customer, it having its own plant and steam power production.

RE-CROSS EXAMINATION.

The original contract with the Grendel mills is for secondary power to the extent of approximately three million kilowatt hours. I don't think we have actually made any contract for the primary power.

RE-DIRECT EXAMINATION.

(696) These negotiations have been since these lists were compiled.

Defendants introduced testimony of D. T. Duncan taken before Judge Watkins at the hearing in Spartanburg on December 12, 1935, which testimony was introduced as a deposition, pursuant to the stipulation of February 18, 1937, set forth at the beginning of this narrative, and is as follows:

D. T. DUNCAN, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

As Chief Engineer for Greenwood County and its Finance Board in connection with the Buzzard Roost project, I was asked by the Board, after the execution of the superseding agreement of November 30, 1935, to review the rates which the Board proposes to charge for power from the Buzzard Roost project in the light of the new contract.

The matter was taken up by me with the engineering staff and I have reached the conclusion that the rates attached to the County Resolution of December 2, 1935, are proper rates to be fixed by the Finance Board, at the present time, on this project.

These rates are substantially the same rates which

were fixed by our engineering staff at the time of the original application of the Public Works Administration for a loan and grant, which was made about the 16th day of November, 1933, a copy of which was introduced in evidence in this case as Defendants' Exhibit No. 49.

We still believe that those rates are substantially correct, and that these rates will yield a sufficient income to take care of the operating costs of the project and to amortize the 4% bonds in 25 years, as provided in the superseding loan and grant agreement.

In the hearing before Mr. Walters I submitted as defendants' Exhibit No. 25 (Record, page 410) my estimate of the gross income and the net amount available for paying the interest and the principal on the loan. That statement indicates a very substantial surplus, and (697) indicates that lower rates than those which were recommended might be adopted by the County. However, the engineering staff felt that it was best to be conservative, and set the rates at the present time at the schedule set out in the minutes of the Finance Board of December 2, 1935. If all of the power is sold it will probably be possible to reduce the rates, if the Board sees fit to do so.

(My understanding of the law is that under the Revenue Bond Act of 1933, Section 21 (28 Stat. 418) that the County may adjust the rates so as to provide ample funds for paying the principal and interest on the debt.)

(The original rates fixed in the application were fixed by me and by my engineering staff, without any advices or suggestions from any one connected with the Public Works Administration.)

In going over these matters again, at the request of the Finance Board, our engineering staff has acted independently of the Public Works Administration, and recommended these figures to the Board without consultation with the Public Works Administration engineering staff.

(I began work on the Buzzard Roost project about the 1st day of Aug., 1933, perfected the application,

and filed it with the Public Works Administration for the Board on Nov. 16, 1933. No one connected with the Public Works Administration or any other branch of the Federal Government solicited this application from me, or as far as I know from any member of the Board. Greenwood County filed the application and has pressed it with the Public Works Administration as vigorously as possible. The application was filed on November 16, 1933, and the allotment was finally made in June, 1934, in the sum of $2,757,000.00, as shown by the defendants' Exhibit No. 50 (Record, page 463). Duke Power Company entered a protest, the Board reconsid-
(698) ered the allotment and after hearing in July, 1934, increased the allotment due to a subsequent increase in mileage of the main transmission lines by $85,000.00, and reaffirmed the original allotment, as shown by defendants' Exhibit No. 52 (Record, pages 64-65). At all times the County has been the body pressing for this allotment. It has not been solicited in any fashion, as far as I know, by the Public Works Administration.)

(We are not confining ourselves to the customers of the Duke Power Company but expect to sell a large amount of power to rural customers, the Greenwood Cotton Mill, the Matthews Cotton Mill, the Ninety Six Cotton Mill, and the Ware Shoals Manufacturing Company, none of which buy any power from the Duke Power Company except the Matthews Cotton Mill which purchases approximately 10% or 15% of its power requirements from the Duke Power Company, the remainder being produced by its private steam engine. Two of the largest customers which the County has contracts with at present are not customers of Duke, namely: The Panola Cotton Mill and the Grendel Cotton Mill. Greenwood County anticipates the attraction of new industries to the County by virtue of the lower rates.)

(699) MR. D. T. DUNCAN testified further on the rehearing as follows:

DIRECT EXAMINATION.

In my previous testimony I have gone into my qualifications. I am the engineer in charge of the Greenwood

County Hydro-electric plant at Buzzard Roost, beginning that work in the fall of 1933. We filed application with the Public Works Administration in the fall of 1933. The first allotment was made June 19, 1934, I think. There was a protest by Duke Power Company which came just after the loan had been approved.

Our first contract was made on December 8, 1934, and the supervening contract Nov. 30, 1935, which is the contract now in effect. Between the time of our application and the time of the allotment in June, 1934, I went quite often to Washington to confer with the Public Works Administration in regard to the Greenwood County application. I do not recall the names of all the people I conferred with there, but I conferred with a great number, including Mr. Wingfield in the Financial Division, Colonel Waite and his aid Colonel Clark.

(In designing the average rates which were put into the original application, there were two considerations I had in mind, mainly I had to have a rate that (700) would retire the loan in a reasonable length of time; and the next was that we had to have a rate under which we could sell power. In getting at that rate one of the main considerations was whether we could undersell the private steam plants in Greenwood County. There are about half a dozen or more mills there that have their own steam plants and the idea was that if we could sell power to them cheaper than they could generate it in their own plants they would buy it. Our big customer in our original application was the Greenwood Cotton Mills. They use about twenty-seven or thirty million kilowatts a year under operating conditions of eighty hours a week although using more than that now because they are running all day. I have been informed that they buy about a million kilowatts from Duke at one of their mills at which their consumption slightly exceeds the output of their steam engine. In other words they use twenty-seven million kilowatts annually and buy one million from Duke.)

We later changed our plans so as to provide for a three County schedule and took on municipalities. That was to have small consumers to give a better diversification. Cotton mills sometimes close down. We signed up a number of our contracts on exactly the flat rate that we fixed in November, 1933, but as to others we

thought it would be better to give customers who use the most power the advantage of the rate with a demand in it. I should say about half of our contracts were signed up under the new rate which averages out just about the same as the original rate.

(In my conversation in Washington before the allotment was made no one connected with any of the divisions of the Public Works Administration discussed with me the Duke Power Company's rates nor did they make any suggestions with regard to our rates.) I was present in July, 1934, with Mr. Barksdale and Mr. Emmett Davis in that conversation with Mr. Herring, Mr. Rau (701) and Mr. Hunt. My recollection is that Mr. Rau thought we should raise our rates a little so that we would have a better margin of liquidation. We did not accept that suggestion.

(My opinion, as to the effect of the development of the Buzzard Roost plant upon the Duke Power Company, is that the Duke Power Company is so large and the Buzzard Roost plant so small, if it had any effect at all it would be infinitely small.)

CROSS EXAMINATION.

The rates we originally set up and incorporated in our application are approximately the same in substance and effect as the rates which we reincorporated in the two rate resolutions of the County and are the same rates at which the County now proposes to operate the plant. When we originally prepared those rates we knew we would have to fix a rate which would enable us to undersell the private steam plants with which our plant would have to compete. We knew that our rates would have to be below the Duke Power Company with which we would have to compete. If our rates had not been below the rates of the private steam plants and of the Duke Power Company we would have no chance to get the business with the exception of the rural lines we propose to build. We, of course, would get those. They weren't being served at the time and any rate we had, if we were instrumental in building the lines we would have those customers. The rural customers were being served only to the extent that the Town of Greenwood had a few rural lines extending

out from town which the customers had built for themselves. Such customers were being served with Duke power coming through the Town of Greenwood. Also I would like to add to that that there were a number of mills that weren't using electricity for their drive and they were proposing to change over into modern electric drive.

I heard the questions that you asked Mr. Davis about the list of customers set forth in the application (702) with whom contracts have been made for the sale of power and the proposed customers and my testimony, if you asked me the same question, would, I think, be the same as Mr. Davis'.

I got to see Colonel Waite, Deputy Administrator, one time by a lot of maneuvering. I am not familiar with his letter to State Engineers that has been introduced in evidence here.

Q: Mr. Duncan, you stated in your opinion you thought the injury which the Duke Power Company would sustain by reason of this plant, would be small or negligible or some such term. I take it you mean by that, that when you consider the business which the Duke Power Company would lose to the Buzzard Roost plant and compare that with the total amount of business which the Duke Power Company has, it would be relatively small? A. Yes, having in mind also the increase is sixteen times as much as the total output of this plant, and by the time you had it built you wouldn't find you lost any power at all.

Q. And if we lost something over a quarter of a million dollars' worth of business there, that would be small compared to the total business? A. It wouldn't actually be lost because you would have this other increased load taking its place.

Q. If, as a matter of fact, the Duke Power Company had sufficient capacity to take care of all the new business it might get and also the present business which it has, then it would have a loss, wouldn't it? A. Yes.

RE-DIRECT EXAMINATION.

We do not have a firm contract with the Grendel Mill, but they have assured us they would change over and electrify the mill immediately upon the building of

(703) this project. I assume they will take about six million kilowatt hours of firm power. In disposing of our dump power we hope to tie up to Mr. Phelps' steam plant, which is almost complete and sell him the dump power, which would be of mutual advantage to both of us.

F. R. SWEENEY, a witness for the defendant, being first sworn, testified as follows:

DIRECT EXAMINATION.

I am associated with Mr. Duncan as a consulting engineer on the Greenwood County project. I went to Washington for a conference with the Public Works Administration officials in connection with this project three or four times. I was present at the hearing in July, of 1934. (No one there made a suggestion with regard to the Duke Power Company rates to me or in my presence. No one made any suggestion that I can recall about Greenwood County's rates in my presence except for that preliminary remark of Mr. Rau's before we went into the checking over of the estimate. In my opinion, as an engineer, the effect upon the Duke System of the development and operation of the Buzzard Roost project would be proportionately neglible or comparatively negligible, I will say. The comparison I have in mind is as to the relative kilowatt hour output, ours being about thirty million kilowatt hours annually and I think, according to the latest report, Duke's output is about two billion.)

CROSS EXAMINATION.

My answer to that last question means that when the business which the Duke Power Company would lose through the Greenwood County plant is considered in comparison to the total business of the Duke Power Company that it would be proportionately small.

(704) Counsel for defendant, Harold L. Ickes, offered in evidence, and the Court admitted, as Defendants' Exhibit 79-A a letter dated December 18, 1934, to Hon. Paul H. Fall, Mayor, Hiram, Ohio, from Mr. Henry T. Hunt, Chairman for the Administrator.

Mr. D. W. ROBINSON, JR.: That letter is along the line of the letters plaintiffs introduced and along the line of the Greenwood County objection.

The COURT: Objection overruled, exception taken and allowed.

The letter reads as follows:

"Legal—WLG:dn docket 3412.

December 18, 1934.

Honorable Paul H. Fall,
Mayor,
Hiram, Ohio.

Dear Mr. Mayor:

With regard to the Hiram electric project, Docket No. 3412.

This Board has received copies of letters dated December 6 from the General Manager of the Ohio Public Service Company addressed to you and to Mr. R. Husselman, respectively. It appears by said letters that the Company has offered to supply the Village of Hiram with electric power at a rate of 2.5¢ per kwh for the first 25,000 kwh per month and 2¢ per kwh for all excess consumption.

It is of course the duty of the Public Works Administration to consider the social desirability of every project. In a project which, like the present one, contemplates construction of an electric generating plant, social desirability depends primarily on the economic advantage which the project will secure for the applicant. Therefore the project has been restudied in the light of the company's new offer.

Fixed production costs according to the estimates of the consulting engineer will be as follows:

Labor and superintendence,	$ 2,910
Maintenance and repairs,	280
Miscellaneous supplies and expenses including insurance	175
Total fixed operating expenses	$ 3,365
Total fixed charges (20 year loan)	1,659
Total fixed costs	$ 5,024

These costs are based on a two shift plant operation, whereas three shifts is the regular utility practice. The allowance for maintenance and miscellaneous expenses is insufficient to allow for emergencies and extraordinary repairs and to cover reasonable insurance. It is believed, therefore, that a conservative estimate of fixed costs should be about $1,000 higher than that of the consulting engineer.

Estimating the average cost of lubricating oil at $300, it is believed that the combined cost of fuel oil and lubricating oil will be approximately as follows:

(705)

Capacity		KWH	Gallons		
1 unit	2 unit	Output	Fuel oil	Price	Total
35%	17.5%	330,000	38,000	5c	$2,100
40%	20%	346,500	40,000	5c	2,300
42%	21%	363,825	42,000	5c	2,400
44%	22%	382,016	44,000	5c	2,500
46%	23%	401,117	50,000	5c	2,800
48%	24%	421,172	52,000	5c	2,900
50%	25%	442,230	54,000	5c	3,000

The following table presents a comparison of the cost of purchased power under the Company's offer and production costs in the proposed municipal plant during the first ten years of operation:

Year	Energy Generated kwh	Production Cost	Energy Purchased kwh	Cost
1st	330,000	$8,100	305,000	$7,600
2d	346,500	8,300	321,500	7,900
3d	363,825	8,400	338,825	8,276
4th	382,016	8,500	357,016	8,640
5th	401,117	8,800	376,117	9,022
6th	421,172	8,900	396,172	9,423
7th	442,230	9,000	417,230	9,844
8th	464,341	9,100	439,341	10,286
9th	487,558	9,200	462,558	10,751
10th	511,936	9,300	486,936	11,238
Total	4,150,695	$87,600	3,901,695	$92,980

In view of the fact that only 269,760 kwh were required to serve the municipal distribution system in 1933, and 265,680 kwh were required therefor in 11

months in 1934, it is believed that the above estimates of consumption are not too low. 25,000 kwh has been added to the estimate of energy generated to allow for energy used in the plant.

At present consumption it appears that the cost of purchased energy would be lower than the cost of production. However, allowance has been made for a steady increase in consumption. At the end of the 10 year period additional plant capacity would be needed to take care of the increase. The reserves required to be set aside out of revenues for this purpose would more than balance the saving of $5,380 over the 10-year period. Possibly some allowance should be made also for loss of taxes.

This Board has received a copy of Mr. Husselman's letter of December 11 to the General Manager of the Company proposing a rate of 2¼¢ per kwh if the quantity metered and billed per annum does not exceed 325,000 kwh, 2¢ per kwh if the quantity falls between 325,000 and 375,000 kwh and 1¾¢ per kwh if the quantity exceeds 375,000 kwh. A copy of the General Manager's reply has also been received. With regard to average rate, there is little difference between Mr. Husselman's proposal and the Company's offer. However, the type of rate schedule proposed by Mr. Husselman is not consistent with sound rate structure. It would result in the same charge for 365,625 kwh as for 325,000 kwh.

On the basis of available data it appears that the project will secure no economic advantage to the Village (706) and that it would be more desirable to accept the Company's offer than to construct the proposed plant. If the applicant concurs in this conclusion the proper procedure will be to withdraw the application as soon as it is clear that the new rates offered by the Company will be put into effect.

Would you be good enough to advise me of the Village's disposition in the premises.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator.

The defendants rest.

(707) **PLAINTIFFS' EVIDENCE IN REBUTTAL.**

Plaintiffs' Exhibit No. 74, being a letter dated October 22, 1935, to Mr. John M. Wright, City Clerk, Eldon, Iowa, from Clark Foreman, Director of the Power Division, which was identified by Mr. Foreman, was admitted in evidence and reads as follows:

"Washington, D. C.,
October 22, 1935.

Mr. John M. Wright,
City Clerk,
Eldon, Iowa.

My dear Mr. Wright:

On examination of your application PWA Docket Iowa-1345 for a municipal light plant, we find that the cost of generating energy, including the debt service, will be 2.45¢ per KWH. According to our information, this cost will be considerably greater than what you will have to pay the private utility in order to buy the power. We are calling this to your attention so that you may avail yourselves of the cheaper cost if you so desire.

Our interest, particularly, is that the consumers get as low a rate of possible. On the basis of our examination, it appears to us that your rates can be reduced and still allow for sufficient coverage to secure the loan. Please communicate with us at once on these points and let us know whether or not you would consider reducing your rates from 5¢ to 4¢, or if not, exactly what rates you would agree to.

Yours sincerely,

CLARK FOREMAN,
Director Power Division
For the Administrator."

Both defendants objected to the introduction of this exhibit upon the same grounds as previously stated. Objection was overruled, and exception duly taken and allowed both defendants.

Plaintiffs offered, and the Court admitted in evi-

dence, the following documents, copies of which are hereto attached, except 80, the original of which is being transmitted.

Plaintiffs' Exhibit No. 75 entitled "Federal Emergency Administration of Public Works, PWA Press Section, Release No. 1044", released Sunday October 28, 1934.

To the introduction of this exhibit both defendants objected upon the grounds previously stated, and upon the further ground that it was objectionable as a press release. Objection was overruled and exception was duly taken and allowed.

Plaintiffs' Exhibit No. 76 entitled "Federal Emergency Administration of Public Works, Administrative Order No. 76 (Supplement 1) subject: 'Power Projects' ", dated August 8, 1935.

Plaintiffs' Exhibit No. 77 entitled "Federal Emergency Administration of Public Works, Office Order No. (708) 43, subject: 'Power Projects' ", dated August 15, 1935.

Plaintiffs' Exhibit No. 78 entitled "Federal Emergency Administration of Public Works, Office Order No. 43 (Supplement 1) subject: 'Power Projects' ", dated August 23, 1935.

Plaintiffs' Exhibit No. 79 entitled "Federal Emergency Administration of Public Works, Administrative Order No. 76 (Supplement 2) subject: 'Power Project' ", dated August 15, 1935.

Plaintiffs' Exhibit No. 80 entitled "Federal Emergency Administration of Public Works, Administrative Order No. 109, subject: 'Power Division' ", dated December 19, 1935.

To the introduction of Plaintiffs' Exhibits 76 to 80, inclusive, both defendants objected upon the grounds previously stated, and upon the further ground that the evidence was not in reply. Objection was overruled and exception was duly taken and allowed.

Plaintiffs' Exhibit No. 81 being a primary power contract dated March 21, 1935, between Duke Power Co. and the Town of Greenwood, S. C., which provides in part as follows:

"(F) The Consumer (Town of Greenwood) agrees

that it will install and maintain all necessary and proper regulating and controlling devices in connection with its receipt, transmission, distribution, control, use and application of said electric power, and should the Consumer use or resell any part of said electric power for purposes requiring a continuity of service or control, not reasonably obtainable from the transmission system of the Power Company, it will install and maintain, or require to be installed and maintained; all proper auxiliary apparatus and devices made necessary by the use of said power for such purposes."

Plaintiffs rest.

Mr. D. W. ROBINSON, JR.: In order to preserve the record we move to strike from the record portions of the testimony which we have objected to, and which has been admitted over our objection, upon the grounds stated in the objection and upon the further grounds that since Mr. Ickes' testimony and Dr. Foreman's testimony has gone in, this testimony is now not competent.

Mr. SCOTT: We join in that motion.

The COURT: All right. I can't agree with you gentlemen on that. I think the testimony is admissible just as I have ruled it.

Mr. D. W. ROBINSON, JR.: Now, your Honor, I am not sure about the proper basis of the December 8, 1934, contract. Frankly we have no objection to the Court considering it, but I am somewhat of the opinion that perhaps the opinion of the Supreme Court would rather indicate it should not be received in evidence, in view of the superseding loan and grant agreement and in view of that I think I should move to strike it from the record. It came in as part of the old record.

The COURT: I will overrule your motion, and at the close of the argument that is going to be one of the questions I am going to decide, and I may be so impressed with the argument on one side or the other that I will want to strike it out, but I don't think so. I think it is part of the history of the whole transaction.

Mr. SCOTT: Show that objection for all defendants.

The COURT: I understand the controlling contract is the new one.

(709) PLAINTIFFS' EXHIBIT NO. 75.

"FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

PWA Press Section
Release Sunday, Oct. 28, 1934 Release No. 1044

An effective and, from a standpoint of training and experience, the strongest inspection organization ever assembled under one bureau to supervise peacetime construction is functioning in connection with the PWA program.

Determined to have a complete and incontestable record of construction activities, Public Works Administrator Harold L. Ickes today has in the field a force of more than 1,500 engineer inspectors.

Washington plans and approves and is responsible for the formulation of policies, but it is upon these men in the field that PWA depends for the actual execution of the great construction program. They are, in truth, the 'eyes' of the Public Works Administration.

It is their duty to see that the billion dollars allotted to non-Federal projects are honestly spent and that the more than 4,000 projects are honestly built.

They are on the job to protect the Government, the borrowing community, contractors and workers alike.

The inspectors see to it that the construction goes forward and is completed in accordance with contract provisions, plans, specifications and P. W. A. regulations.

They see that the quantity and quality of all materials entering into a project conform to the plans and specifications. Materials requiring laboratory tests are tested by nationally known testing laboratories and a record of such tests are furnished to the engineer inspector before he permits the materials to be incorporated in the project.

(710) The PWA inspection force is labor's gaurantee that workmen will receive at least the established wage rate for the class of work performed, and that no man works more than 8 hours a day or 30 hours a week except in cases of emergency and a few isolated cases where exceptional conditions justify more than 30 hours a week.

The safety of the workers is also their concern,

PWA having approved a manual of accident prevention in construction prepared under the supervision of the accident prevention committee of the Associated General Contractors of America.

The inspectors must approve all payrolls and vouchers, bills and invoices for all labor, materials and supplies. PWA inspectors are without authority over contractors whose responsibility is to the local body which borrowed or received a grant for a PWA project. But the control of a PWA inspector is effective, for Washington transmits funds only on satisfactory reports from the PWA inspector.

Their daily and weekly reports constitute a complete record of the project inspected and is the basis upon which the Government pays the grant and purchases the bonds of the applicant. The grant is 30 per cent of the cost of labor and material involved.

State, and local authorities, contractors and others in the early days of PWA complained of "red tape" without a proper understanding of the services performed by the field inspectors. There is a growing appreciation now, however, of what the inspection force is doing.

Unsolicited letters are being received from borrowers commending the work of the PWA inspectors assigned to their projects. These letters state that because of PWA inspection there has been general improvement in the standard of construction.

Compared to benefits resulting from adequate and competent inspection the cost is almost negligible. The (711) Inspection Division estimates that the average cost of inspection is less than one per cent of the total cost of a project.

This cost may be higher on some projects, depending on the location, size and nature, but the average is less than one per cent on PWA projects, whereas the average in private practice is about 2 per cent.

Hanging in the Washington office of Howard A. Gray, Director of the Inspection Division, is a large map dotted with hundreds of red, green and yellow-headed pins. The red dots show active projects where PWA inspectors are on the job. The green indicates projects already completed and the yellow those for which allot-

ments have been made and which will soon require the services of one or more inspectors.

From this map one may visualize the tremendous job already accomplished by the Inspection Division and the heavy task that lies ahead. At the close of the first week in October, 1,398 non-Federal projects, representing a total estimated cost of $758,561,298, were under construction; 211 costing $28,993,856 were under contract and 301 costing $54,071,979 were being advertised. Three hundred seventy-three non-Federal projects had been completed at an estimated total cost of $15,121,637.

Much work lies ahead for the inspectors. On October 6, 1,769 projects were classified as to status, as follows: Contracts executed by applicants, 260; contracts sent to applicants, 623; and allotments approved but contracts not drawn, 275.

In the field there are resident engineer inspectors, assistant engineer inspectors, relief engineer inspectors and supervising engineers working under the supervision of State Engineer Inspectors who are responsible to the Directors of the Inspection Division in Washington.

Some projects require the assignment of only one inspector. On others, depending on size, a score or more of men may be assigned. There are 53 PWA inspectors (712) watching the construction of the Chicago Sanitary District's $42,000,000 sewer job. There are ten inspectors each on the Midtown Hudson Tunnel and Triborough bridge projects in New York with more scheduled to go on duty as construction advances.

The North Platte hydro-electric project in Nebraska just getting under way will require between 30 and 40 Government inspectors as this development covers a distance of 40 miles.

Other big jobs for the Inspection Division are the Philadelphia-Camden high speed shuttle line across the Delaware River Bridge, the St. Paul-Minneapolis and Milwaukee sewage disposal systems, the Eighth Avenue Subway in New York City, the San Francisco waterworks and the Los Angeles schools repair and reconditioning program involving work on 131 buildings.

Almost every known type of construction has been undertaken in the PWA program. This diversity of type requires that the Government inspection force include among its personnel qualified representatives of every

branch of the engineering profession—civil, electrical, mechanical and even mining engineers.

In addition to the field men the Washington office has an engineering staff including technical experts on the construction of schools, colleges, theaters, auditoriums, churches, hospitals, prisons, jails, courthouses, city halls, and other State, county and municipal buildings, parks, streets, pavements and sidewalks.

Other technicians are responsible for the proper handling of all technical matters pertaining to the construction of electric power plants, light and power distribution systems, dams and hydro-electric plants.

Still another group handle bridges, arches, viaducts, culverts, subways and tunnels for thoroughfare. There is another section dealing with dry docks, slipways, submarine railways, yards, piers, wharves, seawalls, dikes, revetments, jetties, breakwaters, canals, levees and similar river harbor, seacoast and lake front improvements. (713) Another engineering unit handles technical matters pertaining to the construction of storn and sanitary sewers, sewage disposal and sewage treatment plants. There also is a group for water supply systems, including purification and treatment plants.

The personnel of the PWA inspection division has been selected with the greatest of care. Every effort has been made to enlist only men of good character and unimpeachable integrity with the proper educational qualifications and practical outside construction experience. As a result PWA has organized a capable force of inspectors, among which are many engineers of national repute.

To head the Inspection Division Administrator Ickes appointed Howard A. Gray. Mr. Gray's principal assistants are John T. Madigan, Assistant Director of Somerville, Mass.; J. G. Gholston, Chief Engineer, of Woodland, Miss., and Walter E. Buckingham, Chief Inspector of New York. Mr. Buckingham is in charge of the field forces. Mr. Gholston is in charge of all technical and engineering activities of the Divison."

(714) PLAINTIFFS' EXHIBIT NO. 76.

"P. W. 39579

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

August 8, 1935

ADMINISTRATIVE ORDER NO. 76 (Supplement 1)

SUBJECT: POWER PROJECTS, Examination of.

Administrative Order No. 76, creating the Power Division, stated:

'In the event that it appears impossible for the State Office to deal with these matters in a reasonable length of time through lack of qualified personnel or other cause, he shall forward the application promptly to the Power Division in Washington.'

This is not to be construed to mean that the liability of the personnel in one examining section in a State Office to handle power projects quickly, relieves the examiners of the other two examining sections from preparing their reports. For example, if legal personnel permits the legal report will be prepared in the field, even though the engineering and finance reports must be prepared in Washington because of lack of personnel in these two sections. It is expected that the majority of the finance reports can be prepared in the field, particularly where the security offered consists of general obligation bonds.

Attention is again called to the fact that preference shall be given to the study of power projects. These include all electric and gas generating and/or distributing systems.

(stamp signed) HORATIO B. HACKETT
HORATIO B. HACKETT,
Assistant Administrator."

(715) PLAINTIFFS' EXHIBIT NO. 77.

"P. W. 39864

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

August 15, 1935

OFFICE ORDER NO. 43

SUBJECT: Power Projects, handling of applications for.

The following procedure shall be followed in handling applications for publicly owned gas and electric facilities:

1. All applications which have been approved by the President but which have been held up in Washington for any cause should be referred immediately to the Director of the Power Division.

2. All dockets which have been approved by all three examining divisions, but which have not yet been transmitted to the Division of Applications and Information should be sent at once to the Director of the Power Division, who will have the necessary NEC-3 Forms prepared.

3. All applications which have been disapproved in the course of examination by the examining division, but regarding which the applicants have not yet been notified, shall be referred to the Director of the Power Division.

4. All dockets under study should continue to be handled as before until the study is completed, when they should be referred to the Director of the Power Division.

5. All new applications arriving from the field should be sent by the Projects Division directly to the Power Division.

6. When the Power Division has approved any application, the Director of the Power Division shall notify
(716) the Projects Division directly so that the application may be routed at once to the Division of Applications and Information.

7. All correspondence concerning power projects in which any technical or controversial question is involved shall be approved and signed by the Director of the Power Division. The Projects Division may, however, continue to prepare and dispatch routine letters which do not touch upon technical or controversial matters.

(stamp signed) HORATIO B. HACKETT
HORATIO B. HACKETT,
Assistant Administrator.

Asst. Adm.
Distribution:
General office only."

(717) PLAINTIFFS' EXHIBIT NO. 78

"P. W. 40191

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

Washington, D. C.
August 23, 1935.

OFFICE ORDER NO. 43 (Supplement 1)

SUBJECT: Power Projects, Handling of Applications for.

Paragraph 4 of Office Order No. 43 is amended to read as follows:

All dockets under study or in suspension shall be delivered to the Power Division not later than September 1, 1935. If the study can be completed by that time, the regular report should accompany the docket. If it is impossible to finish the study by September 1, a memorandum should accompany the docket, giving the Power Division the status of the examination.

(typed sgd.) HORATIO B. HACKETT
HORATIO B. HACKETT,
Assistant Administrator."

(718) PLAINTIFFS' EXHIBIT NO. 79

"P. W. 39837

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

August 15, 1935.

ADMINISTRATIVE ORDER NO. 76 (Supplement 2)

Subject: Power Projects.

1. Application for publicly-owned gas and electric utility projects will be examined and forwarded to Washington within thirty days after receipt in the State Director's office. If for any reason this is not possible, the Central Office must be advised promptly.

2. All applications for publicly-owned gas and electric utility projects will be forwarded to the Central Office whether approved or disapproved (see procedure outlined in Administrative Order No. 75 for handling applications).

3. The Projects Division will furnish a report to the Director of the Power Division on Saturday of each week on the status of all publicly-owned power projects that have not been forwarded to the Power Division by the field offices.

(stamp signed) HORATIO B. HACKETT
HORATIO B. HACKETT,
Assistant Administrator."

Admn.
Distribution:
General.

(719) DEFENDANT'S EXHIBIT NO. 49.

The following is a part of the application of Greenwood County to the Public Works Administration for a loan and Grant introduced in evidence on the hearing

before Walters, Special Master, as defendants' Exhibit 49:

"The rates proposed are only slightly above the Tennessee River Valley Authority rates applied to Tupelo, Miss., and by this proposal and method we establish at our community a similar economical electrical service as that set up by the Tennessee River Valley Authorities development.

We believe that this project will also provide for the Federal Power Commission and our State Railroad Commission (which regulates rates) a proper and fair yardstick and measure of the cost of hydro electric power."

(720) DEFENDANT'S EXHIBIT NO. 78.

"FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

March 16, 1935

ORDER NO. 141

The Electric Power Board of Review is hereby dissolved and the dockets will be returned to the Public Works Administration.

The services of Mr. Henry T. Hunt, General Counsel, will be required for special assignments by the Administrator of Public Works in view of the pending new program; he will also have referred to him all questions relating to public works requiring legal interpretation. The Chief Counsel's opinions will be coordinated with the administrative procedure by routing through the office of the Director, Legal Division, Public Works Administration, before being presented for the signature of the Administrator.

(stamp signed) HAROLD L. ICKES,
Administrator."

(721) DEFENDANTS' EXHIBIT NO. 79.

"FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

Washington, D. C.

January 30, 1935

Memorandum for Mr. Hunt:

On June 20, last a PWA allocation was made on Docket No. 5412 for a power plant for the village of Hiram, Ohio. This allotment was approved by the President on June 27. Subsequently the loan agreement was executed, both by the village and myself, and apparently all requirements for putting through this loan have been complied with.

Meanwhile, it appears that on December 18 you wrote to the Village recommending the withdrawal of the application. This was without my knowledge and in spite of an order that I issued several months ago to the effect that no one on the staff had the power to overrule the President.

In setting up the Electric Power Board of Review, it was my thought that it should pass upon power projects and report to me in case of disagreement with the action taken by the PWA staff. I never for a moment supposed that I was creating a body that, without consulting me, would overrule not only me, but the President, and assume the right of direct negotiation with the municipalities involved.

I would be glad to have you submit to me any facts which you think would make it my duty to rescind this allotment. In the future the powers of the Electrical Board of Review will be strictly confined to what I originally intended them to be, namely, the review of power projects and the making of reports and recommendations to me for my decision.

(typed signed) H. L. I.
Administrator."

(722) DEFENDANTS' EXHIBIT NO. 80.

FEDERAL EMERGENCY ADMINISTRATOR
OF PUBLIC WORKS

Washington, D. C., March , 1936.

THE CITY OF COEUR D'ALENE,
Couer d'Alene, Idaho.

(Attention the Mayor.)

GENTLEMEN: On November 23, 1934, you executed a contract sent you by Federal Emergency Administration of Public Works. Because of the institution of the suit by the Washington Water Power Company in the Federal District Court in Idaho that contract was never executed on behalf of the United States.

In August, 1935, the United States Circuit Court of Appeals for the 8th Circuit decided the case of *Arkansas-Missouri Power Co.* vs. *City of Kennett,* now reported in 78 Fed. (2d) 911. The Director of the Legal Division of P. W. A. subsequently called that case to my attention. It held that if the city signed a standard form of P. W. A. contract, then under the laws of Missouri the city was acting *ultra vires,* because the city was delegating legislative power with reference to the construction of its plant. While the correctness of that opinion seemed to be doubtful, and particularly in the possible application in other states, it seemed desirable to change our form of contract, so as to avoid the difficulties created by that decision by eliminating the features of the contract which had occasioned it. I, therefore, authorized the drafting of a new form of contract to accomplish that end. Many persons in P. W. A. had to be consulted, and although negotiations with several cities began in the (723) latter part of August, 1935, it was not until the latter part of September that the new form of contract had been worked out and approved by me. It took the form of an offer for a unilateral contract. On September 25, 1935, the old contract with the City of Hominy, Oklahoma, was abrogated and an offer in the new form was made by P. W. A. to that city. The old contract was involved in a suit then pending on appeal in the

Court of Appeals for the District of Columbia, entitled "*Oklahoma Utilities Co.* vs. *Ickes*"; the attention of the Court of Appeals was called to the new contract by a motion made in that case, and the case was remanded to the lower court.

Meanwhile there were negotiations with other cities with which P. W. A. had contracts, and abrogating agreements were thereafter signed and new offers made.

However, in the early part of November, in connection with the writing of the brief on my behalf as appellant in the case relating to the County of Greenwood, South Carolina, pending in the Court of Appeals for the 4th Circuit, my attention was called to the findings of the District Court and to the fact that that court had entered a decree against P. W. A. in large part because of certain provisions relating to rates. Those rates provisions had not been eliminated in the new form of contract. It was then decided that our former contract should be further revised so as to eliminate those provisions, in the belief that, even if the District Court in the Greenwood case had correctly interpreted those provisions of the contract, which we denied, the decision would be reversed as a result of the elimination of those provisions. Accordingly, I authorized work to be done on a new revised form of contract. This again took a considerable amount of time.

(724) The first of the new contracts in the revised form to be executed was with the County of Greenwood which was executed on November 30, 1935. As there were a large number of such contracts outstanding, negotiations with you for the execution of a contract in revised form were not begun until on or about December 23, 1935, by which time a decree enjoining you and me from proceeding with the contract of November 23, 1934, had been entered by the Federal District Court and an appeal had been taken therefrom.

Since December 23, 1935, some of my subordinates have been corresponding and conferring with your representatives with a view to the execution by you and the United States of a new contract which would be subject to the injunction decree and would not be effective unless and until that decree were vacated or appropriately modified. After much consideration you decided that you would not execute such a new contract unless and

until the injunction decree had been vacated or appropriately modified so as to permit its execution.

My reasons for desiring to enter into a new contract with you are not merely those which actuated me in approving the new form of contract above referred to but also the following considerations: When I authorized the contract to be sent to you, which you signed on November 23, 1934, and when certain letters and telegrams introduced in evidence in the suit now pending on appeal were sent out by me or my subordinates, I did not have called to my attention by my subordinates, and therefore did not have in mind, the fact that your bonds were to be general obligation bonds payable out of taxes.

(725). In a case where P. W. A. makes a loan to the city to be evidenced by revenue bonds, the sole security for the loan consists of the earnings of the project constructed by means of funds supplied by the United States. Under Title II of the National Industrial Recovery Act, no loans can be made which are not reasonably secured. Consequently, if the sole security consists of such revenues, I am obligated in deciding whether the loan should be made, to consider the prospective earnings of the project and it is therefore necessary for me to take into account the prospective rates that will be charged by the city and also to some extent the prospective rates that will be charged by the city's competitors, because prospective competitive rates may affect the earning power of the project and therefore the security of the loan.

Even in a case where the bonds are revenue bonds, our present revised form of contract provides that the United States shall have no rights or power of any kind with respect to the rates to be charged by the city, excepting only such rights as it may have as a holder of the revenue bonds under the laws of the State.

But where, as in your case, the loan is to be evidenced by general obligation bonds of the city, then, in determining the security of the loan, there needs to be considered merely the financial condition of the city generally and (except in unusual instances where a bad investment by the city in a project may seriously impair its finances) P. W. A. has ignored the prospective revenues of the proposed project and therefore likewise has ignored the rates of the city and of its competitors.

As you can well imagine, I am occupied with a multitude of duties daily and occasional errors are therefore (726) unavoidable. Because of that fact an error was made in including, in the contract with you, provisions with respect to the rates of the city; and for like reasons I approved without adequate consideration, an attitude, expressed in the letters and telegrams above referred to, suggested by some of my subordinates with respect to the rates and services of The Washington Water Power Company. I reached the conclusion several months ago that that attitude was entirely unjustified and have completely repudiated and abandoned it. I reached that conclusion when my attention was first again directed to the old contract and those letters and telegrams by reading for the first time, when the case was on appeal the opinion of the District Court in the case brought by The Washington Water Power Company. I regret that I did not read that opinion sooner, but must again explain that my multitude of duties makes it impossible for me to keep constantly and closely in touch with the very considerable number of suits in which, as Administrator, I am involved.

I then concluded that, unless a new contract could be made with you which could be justified without any regard to such considerations as the rates or services of the city or of The Washington Water Power Company, I would be obligated to rescind the allotment on which the old contract of November 23, 1934, had been based. Had I so acted, there would, of course, be no contract whatsoever, for the old contract has never been executed and is, therefore, not in effect. Upon reconsidering the project I approved the making of a new contract with you in the form herewith enclosed. In giving that approval I have considered solely (a) whether the project would be a proper part of the comprehensive program (727) of Public Works, (b) whether your general obligation bonds would be reasonably secured, (c) whether the project would help adequately to increase employment, and, (d) other factors required to be considered by Title II of the National Industrial Recovery Act and the applicable Executive Orders of the President. I have not given any consideration whatsoever to any other factors and especially have not considered (1) the rates which may be charged by you, (2) the rates or

service of the power company, (3) whether lower power rates are desirable, (4) whether it is desirable that you should own and operate your own power plants—these all being matters for your consideration.

I have no intention of ever executing the old contract or any contract containing those terms of that contract which are not also contained in the new attached contract. My position is that I have waived irrevocably all those provisions of the old contract not set forth in the new, and have completely abandoned, and regret that there was ever expressed by or for me, any intention to have any control of any kind of your rates or any interest in the rates or services of the power company or of the city.

I feel strongly that the constitutionality of the PWA statute (affecting the lives of millions of persons) should not be determined in a case involving a proposed contract containing certain of the provisions contained in the old proposed contract, and the approval of which was based upon the consideration of improper factors, I have therefore been considering whether it would not be for the best interests of the United States that the allotment upon which your contract was based should be (728) rescinded so that there would be no contract, in which event the case above referred to now pending on appeal would be wholly moot. Because it might be unfair to you, I have concluded that, instead of taking such a step, I will ask my attorneys to file in the Court of Appeals a motion calling attention to the facts set forth in this letter, to the proposed new contract, and to other relevant facts, and asking the Court of Appeals to vacate the decree of the lower court and remand the case in such a way as to permit the execution of the new contract and a new trial based thereon, at which trial evidence will be introduced in accordance with the foregoing.

It is my understanding that, if and when the present decree is vacated or appropriately modified, you will join with me in executing the enclosed new contract.

HAROLD L. ICKES,
Administrator.

(729) DEFTS. EX. NO. 80.

P. W. 51718

This exhibit is being transmitted to the Circuit Court of Appeals, the material parts being as follows:

LOAN AND GRANT AGREEMENT BETWEEN THE CITY OF COEUR D'ALENE, IDAHO, AND THE UNITED STATES OF AMERICA (P.W.A. DOCKET NO. 6695.)

1. *Loan and Grant.* The Government will aid in financing the construction of a water system, including sinking wells, installing pumps and a distributing system for water service and a Diesel engine generating plant and electric distributing system (herein called the "Project"), by making a loan and grant to the applicant in an amount not exceeding in the aggregate the sum of $650,000.

(i) *Security*: Payable as to both principal and interest from *ad valorem* taxes which may be levied without limit as to rates or amount upon all the taxable property within the territorial limits of the Applicant.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein agrees to purchase or to make any grant.

(c) *Plans and Specifications and Certificate of Purposes*: If the applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to comply with Title II of the National Industrial Recovery Act in all respects.

12. The Administrator shall have no right or power of any kind with respect to the rates to be fixed or charged by the Project.

13. This agreement is made with the express understanding that neither the loan nor the grant herein

described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or construction Docket No. 6695.

(730) DEFENDANTS' EXHIBIT NO. 81.

"LENAWEE COUNTY LIGHT & POWER COMPANY

Adrian, Michigan
August 13, 1934

Colonel Henry M. Waite,
Deputy Administrator,
Public Works Administration,
Washington, D. C.

Dear Sir:

We are advised that the application for a loan from the Public Works Administration by the village of Tecumseh, Michigan, for a municipal electric light plant and distribution system contained a statement to the effect that the undersigned, the Lenawee County Light & Power Company, is without a franchise to occupy the streets in the village of Tecumseh for the purpose of distributing electric energy for lighting and other purposes. Lenawee County Light & Power Company does not concur in such a statement, and, on the contrary, takes the definite position that it has a perpetual right, protected by the Federal Constitution, to continue to serve the residents of the village of Tecumseh, Michigan, through the facilities situated in the streets of said Village.

In order to support the Company's contention in respect to its franchise rights in Tecumseh, we have obtained opinions of two of the outstanding attorneys of the State of Michigan, copies of which we are enclosing herewith for your information.

As we have at no time been afforded an opportunity to be heard in order to voice our opposition to the application of the Village of Tecumseh for the loan above referred to, we would very much appreciate it if, prior to the taking of any favorable action upon the applica-

tion, we may be given an opportunity to send a representative or representatives to Washington in order to present to your Board valid and sufficient reasons why the said application should be denied.

Will you kindly advise us as to the present status of the application and whether we may expect an opportunity to present to you our objections to the said application and the reasons why the same should not be granted?

Yours very truly,

(signed) D. E. BYERLEY,
Vice-President and General Manager.

DEB:L
ENCLOSURES

300328 AUG 15 '34"

(731) DEFENDANTS' EXHIBIT 82.

D. C. Green, Trustee

MIDDLE WEST UTILITIES COMPANY
20 North Wacker Drive
Chicago, Illinois

April 4, 1935

Henry T. Hunt, Chairman
Electric Power Board of Review
Federal Emergency Administration of Public Works
Washington, D. C.

Dear Mr. Hunt:

This refers to Dowagiac, Michigan, electric project docket #5995 and will confirm our telegram giving you a report on the election held April 1st, 1935.

Before giving you these results, it might be well to briefly review this project. Dowagiac is being furnished electric service by Michigan Gas and Electric Company, one of the operating units in the Middle West Utilities System. The electric franchise will remain in effect until 1953. The city owns and operates an electric plant from which it sells itself electricity for street lighting

and water pumping. On September 26th, 1933, a special bond election was held to determine whether the city should expand its municipal plant selling the bonds to PWA. In Michigan this requires a two-thirds majority vote of the taxpayers. At that election, 773 taxpayers voted in favor of the project and 420 against it. This lacked the required two-thirds majority.

The city continued to connect new customers to its own plant which prompted the Michigan Gas and Electric Company to secure an injunction restraining the city from connecting further customers. This injunction is still effective.

In the city's application to PWA certain lower rates were proposed. The Company agreed to meet the rates proposed for the municipal plant, in order to destroy the social desirability and self-liquidation of the project. These lower rates are now in effect in Dowagiac.

The election recently held on April 1st, 1935, was on the question—

"Shall the City of Dowagiac sell to its inhabitants electrical energy for their domestic, commercial and power uses,"

This was not a bond election either for general obligation bonds or for revenue bonds. The fact that this was not a bond election was emphasized by the city in its advertising and publicity prior to the election. In one circular prior to the election, the city made this statement—

"$1,000 reward will be paid to any person, or persons, who will prove that there is any bond issue to be voted on at the city election or that the municipal ownership ballot is other than just what it reads."

This circular was signed by the "Democratic Publicity Committee". In another circular the city had this to say:

"There are no bonds, we merely ask you for the right to sell the surplus electricity which we can generate with our present plant....."

(732). Copies of these two circulars are attached for your information.

It is significant to note here that reference is made to the present plant and not to any proposed or future plant. The voters were asured that there was no obligation on their part and that they were merely voting on the question of whether or not the city could sell energy to the citizens from the present plant.

The results of this election were 1,285 in favor of the question and 1,038 against. This count represents the total voters and not merely taxpayers.

The following table shows the comparison between the election on April 1st, 1935, and the previous election on September 26th, 1933. In this table, we are showing the total votes and not merely the taxpayer's votes in the 1933 election in order to show the comparison with the total vote of the 1935 election.

	For Municipal Ownership	Against Municipal Ownership
September 26, 1933,	1,116	527
April 1, 1935,	1,285	1,038
Gain	169	511

There was a heavier vote in 1935 than in 1933. The figures show, however, a much greater gain in votes against municipal ownership as compared to the votes in favor of it.

The April 1st, 1935, election shows that it was considerably short of the required two-thirds majority for general obligation bonds even if bonds were being considered. There would have been more votes against municipal ownership if bonds had been involved. The emphasis was on the fact that it merely represented a vote as to whether the city should sell electricity from the present plant.

Neither was the vote sufficient for revenue bonds which in Michigan require a 60% majority. In this case, as in the case of general obligation bonds, we think it is reasonable to assume that the city would not have obtained as many votes if the people had been voting upon the question of revenue bonds.

The election indicates to us an increasing sentiment

in favor of the company, prompted in part by the fact that we met the rates proposed by the municipal plant thereby destroying that apparent desirability of the project.

(733) It is the opinion of our attorneys that the election held April 1st, 1935, in no way changes the legal aspect. It is the opinion that the present injunction will still hold. It is further the opinion that the election in no way authorizes the city to add to the existing municipal plant or to construct a new one. Any move of this nature requires an election on the question of adding to the present plant or building a new plant and issuing of bonds of one form or another. The Michigan law further requires that the electorate be told frankly before the election that bonds are being voted. On April 1 the electorate was assured that no bonds of any description were being voted.

It is my purpose to be in Washington in about a week or ten days and I shall appreciate the privilege of discussing this matter with you further and giving you any further information on the matter that you may desire.

Yours truly,

(signed) EDWIN VENNARD.

Edwin Vennard
1v

(734) DEFT. EX. 83.

This Exhibit is being transmitted to the Circuit Court of Appeals, the material parts being as follows:

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the construction of a Diesel-electric generating plant and distribution system (herein called the "Project", such completed Project together with all additions, extensions and appurtenances thereto hereafter constructed being herein called the "System") by making a loan and grant to the City of Dowagiac (herein called the "Applicant") not exceeding in the aggregate the sum of $202,000.

(i) *Security*: Payable as to both principal and interest from, and secured by an exclusive first lien on, the gross revenues of the System after provision only for the reasonable operation and maintenance expenses thereof;

4. *Conditions Precedent*: The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(c) *Plans and Specifications and Certificates of Purposes*: If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Michigan and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof.

(735) DEFTS. EX. 84

This exhibit is being transmitted to the Circuit Court of Appeals, the material parts being as follows:

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the construction of a turbo-electric generating plant and distribution system (herein called the "Project") by making a loan and grant to The City of Sandusky (herein called the "Applicant") not exceeding in the aggregate the sum of $1,515,000.

(i) Security: Payable as to both principal and interest from *ad valorem* taxes which may be levied without limit as to rate or amount upon all of the taxable property within the territorial limits of the Applicant.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(c) *Plans and Specifications and Certificate of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Ohio and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understand-

ing that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof.

(736) DEFENDANTS' EXHIBIT NO. 88.

"MINUTES OF FINANCE BOARD OF GREENWOOD COUNTY

Greenwood, S. C., November 30, 1935.

After proper notice to all parties, a special meeting of The Finance Board of Greenwood County was held this 30th day of November, 1935.

Present: E. L. Brooks, Chairman, S. A. Agnew, R. C. Lominick, M. G. Bowles, and E. I. Davis, Secretary.

The following resolution was offered by Mr. Lominick, seconded by Mr. Bowles, and unanimously passed:

A RESOLUTION TO AUTHORIZE THE EXECUTION OF A SUPERSEDING LOAN AND GRANT AGREEMENT WITH HAROLD L. ICKES, FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, SUPERSEDING THE LOAN AND GRANT AGREEMENT OF DECEMBER 8, 1934.

BE IT RESOLVED by The Finance Board in meeting assembled:

WHEREAS, Greenwood County and Harold L. Ickes, Federal Emergency Administrator of Public Works, entered into a loan and grant agreement under date of December 8, 1934, as shown by the Minutes of this Finance Board;

AND, WHEREAS, The Finance Board and Harold L. Ickes, as Federal Emergency Administrator of Public Works desire to enter into a superseding loan and grant agreement as set out in a copy of the contract attached to these Minutes;

AND, WHEREAS, The Finance Board is of the opinion that it is to the interest of the County to enter into this superseding contract;

(737) AND, WHEREAS, the Hon. H. H. Watkins, District Judge of the United States District Court for the Western District of South Carolina, by injunction order of August 26, 1935, in an action by Duke Power Company, et al., against Greenwood County, et al., has enjoined the County from proceeding to build its Buzzard Roost Project with Federal funds and from proceeding under the contract of December 8, 1934;

AND, WHEREAS, this Board has no intention of violating the terms of that injunction order, from which an appeal has been taken;

NOW, THEREFORE, Be it Resolved:

1. That it is the sense of the Board that the loan and Grant Agreement of December 8, 1934, should be superseded by the Agreement attached hereto, so that this superseding loan and Grant Agreement, when delivered, shall constitute the entire agreement between the parties.

2. That the County Supervisor, County Treasurer and Secretary of the Board are authorized and directed to execute the superseding Loan and Grant agreement and to deliver an executed copy thereof to Harold L. Ickes, Federal Emergency Administrator of Public Works and to file with the records of the Board an executed copy.

3. That it is expressly understood that this superseding Loan and Grant Agreement is made subject to the injunction order of the 26th of August, 1935, and is not intended in any way to violate the terms of that Order.

There being no further business the meeting adjourned.

E. I. DAVIS, Secretary.

E. L. BROOKS, Chairman.

(738) DEFENDANTS' EXHIBIT NO. 89.

"RESOLUTION BY FINANCE BOARD FOR GREENWOOD COUNTY

Greenwood, S. C.
Dec. 2, 1935.

Pursuant to call by Chairman, a special meeting of the Finance Board for Greenwood County met in Office of County Supervisor, Court House, Greenwood, S. C., at 10 o'clock A. M., Monday, Dec. 2, 1935, E. L. Brooks, Chairman, R. C. Lominick, M. G. Bowles, S. A. Agnew and E. I. Davis, constituting full Board, were present.

Meeting was called to order by E. L. Brooks, Chairman.

Mr. M. G. Bowles moved the adoption of the following Resolution:

WHEREAS, according to Act #299, S. C., 1935, and as amended, rates for services furnished shall be fixed precedent to issuance of bonds and

WHEREAS, the original application filed by Greenwood County set up revenue table based on schedule of rates set up by Greenwood County which schedule was incorporated without alteration and

WHEREAS, Greenwood County has requested its Engineer to check income based on output and the proposed rates to be charged for services and

WHEREAS, the project Engineer reports that a thorough recheck has been made on production and income and that the rates set up in Bond Resolution are sufficient to liquidate the loan.

NOW, THEREFORE, BE IT RESOLVED by Finance Board for Greenwood County in meeting assembled this 2nd day of December, 1935, that rates to be charged by Greenwood County for services are as follows:

(739) SCHEDULE A

Greenwood County Municipal Power Plant

Wholesale Power Rates to Municipalities

Wholesale Rate:

Demand-Charge—$1.00 per K. W. per month
Demand-Maximum integrated sixty (60) minute period.

Energy Charge:

First—100,000 Kilowatt hours per month at 5. Mills per K. W. H.
Next—200,000 Kilowatt hours per month at 4. Mills per K. W. H.
Over—300,000 Kilowatt hours per month at 3. Mills per K. W. H.

In no case shall the energy plus the demand charge aggregate less than 7.0 Mills per K. W. H. for current consumed.

Minimum Monthly Bill:

$100 per K. W. per month, and in no case shall the minimum bill be less than the charge for sixty (60) per cent of the highest demand occurring during the previous consecutive (12) month period.

Adjustment of Demand Charge:

(a) Demand charge may be adjusted if, and when, Power Plant deems necessary to correct for power factors lower than eighty-five (85) per cent. Such adjustments will be made in such manner as to bring the demand charge to the equivalent af eighty-five (85) per cent power factor.

SCHEDULE B

GREENWOOD COUNTY MUNICIPAL POWER RATES TO INDUSTRIES AVAILABLE

To industrial power users demands in excess of 10 K. W. Service at primary distribution voltage or secondary distribution volt at discretion of PURCHASER.

Demand Charge

$1.15 per K. W. Per Month.
Demand-Maximum integrated thirty (30) minute period.

(740) *Energy Charge*

First 10,000 K. W. H. per month at 11.5 Mills per K. W. H.
Next 25,000 K. W. H. per month at 6.0 Mills per K. W. H.
Next 65,000 K. W. H. per month at 4.6 Mills per K. W. H.
Next 400,000 K. W. H. per month at 3.45 Mills per K. W. H.

Excess
Over 500,000 K. W. H. per month at 2.875 Mills per K. W. H.

In no case shall the energy charge plus the demand charge aggregate less than 6.5 Mills per K. W. H. for current consumed.

Minimum Monthly Bill

$1.15 per K. W. of maximum demand, but in no case shall the maximum demand for billing purposes be taken as less than 60% of the Maximum monthly demand billed during the preceding twelve (12) consecutive months period.

Seasonal Loads

Purchaser may in its discretion discontinue service on seasonal loads and establish a minimum payment for idle month sufficient to cover costs involved.

Adjustment of Demand.

Demand charge may be adjusted if, and when, power plant deems necessary to correct for power factor lower than eighty-five (85) per cent. Such adjustments will be made in such manner as to bring the demand charge to the equivalent of eighty-five (85) per cent power factor.

SCHEDULE C

RETAIL RATES TO RURAL CUSTOMERS

Available

To all rural customers:

First 50 Kilowatt hours per month @ 3.50¢ per K. W. H.
Next 150 Kilowatt hours per month @ 2.30¢ per K. W. H.
Excess over 200 Kilowatt hours per month @ 1.15¢ per K. W. H.

(741) *Minimum Monthly Bill*

5 Ampere Meter	$0.85
15 Ampere Meter	1.15
50 Ampere Meter	1.75

Motion by M. G. Bowles to adopt this resolution was seconded by S. A. Agnew.

After general discussion, Chairman called for a vote, which vote was as follows:

Those voting yes: S. A. Agnew, M. G. Bowles, R. C. Lominick, E. I. Davis and E. L. Brooks.
Those voting No: None.

Motion was declared carried by Chairman.

Meeting was adjourned in due form on motion made, seconded and carried.

E. I. DAVIS, Secretary.

E. L. BROOKS, Chairman.

(742) DEFENDANTS' EXHIBIT NO. 90.

"DUKE POWER SYSTEM

SALES OF ELECTRICITY (IN K. W. HRS.) AND GROSS REVENUE THEREFROM

(INTER-COMPANY SALES ELIMINATED)

	Kwhrs sold	Gross Revenue from sale
Year 1929	1,609,815,776	23,990,572.33
1930	1,405,112,928	22,276,841.66
1931	1,414,430,124	22,708,746.95
1932	1,337,735,087	21,091,593.77
1933	1,462,480,929	21,265,472.64
1934	1,328,637,162	20,167,530.38
1935	1,476,136,085	21,234,618.03
1936	1,791,232,706	24,097,803.61"

(743) DEFENDANTS' EXHIBIT NO. 91

DUKE POWER COMPANY

Kilowatt-Hour Output "Consolidated" North Carolina and South Carolina—1928-1936, Incl.

	(Typed)	(In Pencil)
1928	1,847,072,621	1,847,103,240
1929	1,981,239,709	1,981,839,540
1930	1,760,622,654	1,761,862,244
1931	1,766,921,211	1,768,184.411
1932	1,650,500,000	1,649,582,952
1933	1,679,906,454	1,765,737,132
1934	1,642,933,219	1,641,748,841
1935	1,792,111,249	1,790,819,741
1936	2,176,845,717	2,177,443,017

(744) Plaintiffs requested the Court to find the following facts:

I.

The plaintiffs are electric utility corporations engaged in the intrastate sale and distribution of electric power and energy within the State of South Carolina. Their business within said state and their rates for the sale and distribution of electric power and energy therein are subject to the exclusive jurisdiction, regulation and control of the Public Service Commission of said State. Under the statutes of said State plaintiffs are required, among other things, to adhere to the rates prescribed by the State authorities; to charge no other or different rates than those so prescribed; and to give no undue preference or advantage in rates or service to any customer or customers. Plaintiffs are required to maintain and operate their facilities so as to be able at all times to render adequate and efficient service to the public and they are not permitted to abandon any of their facilities or discontinue any part of their service, except for non-payment of undisputed charges, without first obtaining the consent of the proper State authorities.

II.

The plaintiffs have invested many millions of dollars in electric power facilities for the purpose of serving the territory in which they operate, including the Counties of Greenwood, Newberry and Laurens, in which the proposed Buzzard Roose project, if constructed, would operate in competition with plaintiffs.

III.

The plaintiffs are adequately serving said territory, and, for the purpose of conducting their business therein, have heretofore secured and now own and use valuable franchises and operating rights. Their established and available facilities are amply sufficient adequately to serve said territory for many years. Their rates have (745) been duly approved by said Public Service Commission of South Carolina.

IV.

On November 16, 1933, the defendant, Greenwood County, made application to the Federal Emergency Administration of Public Works for a loan and grant of federal funds to be made under Title II of the National Industrial Recovery Act in the amount of $2,627,197 for the construction on the Saluda River in the State of South Carolina, at a point known as Buzzard Roost, of a hydro-electric power plant, together with transmission and distribution lines extending into and through the Counties of Greenwood, Newberry and Laurens, for the purpose of engaging in the business of furnishing electric power and energy to municipalities, industrial enterprises, private individuals and the public generally for domestic, commercial and industrial uses. The application was approved by the Federal Emergency Administration of Public Works on June 20, 1934 subject to the execution of a contract satisfactory to the Administrator of Public Works between the United States of America and Greenwood County. Thereafter, on November 7, 1934 the amount of said proposed loan and grant was increased by the Federal Emergency Administrator of Public Works to $2,852,000.

V.

The County would put into said project no funds or property of its own and would not incur any liability or assume any obligation for either the construction or the operation of said project. The entire fund for the construction thereof, amounting in the aggregate of $2,852,000, would be advanced by the Federal Emergency Administrator of Public Works by way of a loan and grant of federal funds. The grant would amount to 30 per centum of the cost of the labor and materials employed upon the project, and no part of it would have to be repaid in any manner. The loan, covering the remainder of the entire cost of said project, including the (746) cost of the site, right-of-way, etc., would be represented by bonds to be issued by the County to the United States of America, both the principal and interest of which would be payable solely from the prospective revenues of the project.

VI.

The project would be a purely local and intrastate enterprise; it would be constructed primarily for the purpose of engaging in the utility business of furnishing electric power and energy to municipalities, industrial enterprises, private individuals, and the public generally for domestic commercial and industrial uses not only within Greenwood County but also without said County.

VII.

The Federal Emergency Administration of Public Works in determining whether to approve or to disapprove an application for a loan and grant of federal funds for the construction of a municipal power plant, such as the proposed Buzzard Roost plant, adopted and applied the criterion that no such application would be approved unless the rates of the proposed plant would be materially lower than the rates of the privately-owned utility with which the proposed plant would compete. Accordingly where the privately-owned utility agreed to put in effect rates at least as low as the rates of the proposed municipal plant the application was not approved. This criterion was adopted and applied by the Federal Emergency Administration of Public Works pursuant to its announced power policy to bring about the reduction of electric power rates so as to make electric energy more widely available at cheaper rates. The effect of this policy was to constitute the rates of the proposed municipal plant a standard or yardstick by which to measure, regulate and control electric power rates and to bring about reductions in such rates.

VIII.

The application filed with the Federal Emergency
(747) Administration of Public Works on November 16, 1933 stated that the rates of the proposed Buzzard Roost plant were only slightly above the Tennessee Valley Authority rates which would be applied in Tupelo, Miss., and that the proposed plant would establish, in the territory in which it would operate, an economic electric service similar to that set up by The Tennessee Valley Authority and would furnish a proper and fair yard-

stick and measure of the cost of hydro-electric power. On the application being filed the rates of plaintiffs, with which the proposed plant would compete, were investigated by the Federal Emergency Administration of Public Works, and the conclusion was reached that plaintiffs' rates were excessive. The rates of the proposed plant, being materially lower than plaintiffs' rates, the application met the required test of the Public Works Administration, and was accordingly approved pursuant to the policy of said Administration to approve applications for such plants as would be effective in bringing reductions in power rates in the localities in which such plants would be operated.

IX.

The rates at which the proposed plant would sell electric power and energy being materially lower than the rates of plaintiffs, the County, because of said lower rates, has been able to enter into contracts for the sale of a large part of the electric power and energy which would be produced by the proposed plant to consumers of power who are now, and for a number of years have been, customers of the plaintiffs. If the project should be constructed and put into operation the plaintiffs will be deprived of their customers in the territory in which the project would operate, and the property and business of plaintiffs will be seriously and permanently injured.

X.

The terms and conditions of the loan and grant, as approved by the Federal Emergency Administration of (748) Public Works, were first set forth in detail in a contract which the County entered into with the Administrator of Public Works on December 8, 1934. This contract was superseded by a new contract dated November 30, 1935. This new contract made no change in the character, scope or purpose of the project, in the nature of the business in which it would engage, in the territory in which it would operate in the event of its construction or in the necessary and inevitable effect on plaintiffs' rates. The new contract was not based on any new application by the County to the Federal Emergency Ad-

ministration of Public Works, but was entered into pursuant to the original application and to the resolutions of the Federal Emergency Administration of Public Works dated June 20, 1934, and November 7, 1934, approving said application. Under the new contract the same amount of federal funds would be advanced by the Administrator of Public Works by way of loan and grant, on terms and conditions whereby the County would make no investment of its own funds for the construction of the project, and would incur no liability and assume no obligation either for its construction or for its operation.

XI.

The new contract did eliminate the provision contained in the original contract requiring the County to "adopt a resolution satisfactory in form and substance to the Administrator providing for rates to be charged for services afforded by the hydroelectric system", but the rates to be charged by the proposed plant were not in fact changed, the rates set forth in the rate resolution adopted by Greenwood County on December 2, 1935, after the execution of the new contract of November 30, 1935, being the same as the rates originally set forth in the County's application filed with the Federal Emergency Administration of Public Works on November 16, 1933, and also the same as the rates set forth in the original rate resolution adopted by the County on October 1, 1934.

(749) XII.

The contract entered into by the County with present customers of the plaintiffs for the sale to such customers of a large part of the power which would be produced by said plant were entered into at the rates originally set forth in the County's application filed with the Federal Emergency Administration of Public Works on November 16, 1933. These contracts, and the rates set forth in them, were not changed when the new contract of November 30, 1935, was entered into, and if said plant is constructed said contracts will be carried out as originally intended.

XIII.

If said plant is constructed as proposed, the plaintiffs, in order to avoid the loss of their business and the consequent injury to their property, will be forced to make material reductions in their rates so as to meet the competition of the lower rates of said plant; and the direct, necessary and inevitable effect of said loan and grant for the construction of said plant will be to regulate and control the intrastate electric rates of the plaintiffs, not only in the territory in which said plant would operate, but throughout the entire territory in which plaintiffs do business.

XIV.

The proposed plant would not and could not be constructed and operated at rates lower than those of plaintiffs except for said loan and grant of federal funds, and the injury to the business and property of the plaintiffs and the loss and damage which they would sustain would be directly caused and brought about by said loan and grant of federal funds.

(750) WHEREFORE, the parties agree upon the above and foregoing statement of evidence as a true, full, correct and complete statement of all the material evidence taken and given on the trial of this cause.

This 1st day of July, 1937.

W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs, Appellants.

RUPERT A. DAVIS,
W. H. NICHOLSON,
D. W. ROBINSON, JR.,
Attorneys for Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, Defendants, Appellees.

ROBERT E. SHER,
Attorney for Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendant, Appellee.

IT IS ORDERED: That the foregoing Statement of Evidence, consisting of 201 pages, be, and the same is, hereby approved.

July 1st, 1937.

J. LYLES GLENN,
United States District Judge.

(751) **ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

United States District Court
West. Dist. of So. Car.
JUL. 1, 1937.
FILED
..... A. M. ..... P. M.
W. D. WHITE, Clerk.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. H. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

In Equity.

On motion of Counsel for both parties, it is Ordered:

That the Clerk of this Court do transmit to the United States Circuit Court of Appeals at Richmond, Va., for the use of that court, the following original exhibits in the above case:

1. Plaintiffs' Exhibit 12—Map of Plaintiffs' Transmission System in North and South Carolina.

2. Plaintiffs' Exhibit 36—Circular No. 1. PWA.

3. Plaintiffs' Exhibit marked Post Exhibit No. 10—

Loan and Grant Agreement between the City of Coeur d'Alene and the United States.

4. Defendants' Exhibit 5—Document No. 96 *re.* Santee project.

5. Defendants' Exhibit 8—General Contract Bid.

6. Defendants' Exhibit 9—Hydraulic Bid.

7. Defendants' Exhibit 10—Electric Generators Bid.

8. Defendants' Exhibit 11—Gates, rakes, etc. Bid.

9. Defendants' Exhibit 39—Federal Power Commission National Power Survey.

10. Defendants' Exhibit 49—Copy of Application of Greenwood County to Public Works Administration for Loan and Grant.

(752) 11. Defendants' Exhibit 46—Report of South Carolina Power Rate Investigating Committee.

12. Defendants' Exhibit 57—Minutes of hearing before PWA Electric Power Board of Review, July 2, 1934.

13. Defendants' Exhibit 70—Pamphlet issued by United States Government Printing Office, 1934, Senate Document 167, Public Works Administration.

14. Defendants' Exhibit 71—Pamphlet issued by United States Government Printing Office, 1936, Senate Document 183—Pending Non-Federal PWA Projects.

15. Defendants' Exhibit 72—Pamphlet issued by the United States Government Printing Office, 1936, Senate Document 184, Public Works Administration allotments for gas and electric projects.

16. Defendants' Exhibit 73—Pamphlet issued by United States Printing Office, 1936, Senate Document 193, Non-Federal Public Works Administration projects.

17. Defendants' Exhibit 74—Pamphlet issued by United States Government Printing Office, 1936, entitled: "first Deficiency Appropriation Bill—1936."

18. Defendants' Exhibit 75—Pamphlet issued by United States Government Printing Office, 1936, entitled "Revenue Bond Financing by Political Subdivisions."

19. Defendants' Exhibit 76—being a pamphlet entitled "Employment Created by PWA Construction" by Herman B. Byer of the Bureau of Labor Statistics.

20. Defendants' Exhibit 80—The loan and grant agreement between the City of Coeur d'Alene, Idaho, and the United States of America, attached to the letter of March 14, 1936, printed in the record.

21. Defendants' Exhibit 83—Letter dated December 31, 1935, being the loan and grant agreement between the City of Dowagiac, Mich., and the Public Works Administration.

22. Defendants' Exhibit 84—Letter dated January 15, 1936, being the loan and grant agreement between the City of Sandusky, Ohio, and the Public Works Administration.

23. Defendants' Exhibit 85—Book by Harold L. Ickes, entitled: "Back to Work."

24. Plaintiffs' Exhibit 80—Administrative Order 109 dated December 19, 1935.

This the 1st day of July, 1937.

(Signed) J. LYLES GLENN,
Judge of U. S. District Court.

(753)

United States District Court
West. Dist. of So. Car.
JUN 2 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

OPINION.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company, a Corporation Organized and Existing Under the Laws of the State of New Jersey, Complainant,
versus
Greenwood County, and E. L. Brooks, S. A. Agnew, and E. I. Davis, Members of and Constituting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.
} In Equity.

(754) PREVIOUS HISTORY OF THE SUIT.

This suit in equity now pending in the Western District of South Carolina has been before the District Court, the Circuit Court of Appeals for the Fourth Circuit and the Supreme Court. It had been before these Courts before it came to the attention of the Judge now charged with the responsibility for trial and decision in *in* mid-January of 1937. Originally the matter was heard before the District Judge, who after considering the testimony taken before a Master, granted an injunction. At that time the District Judge wrote an able and exhaustive opinion which is reported in 12 Fed. Sup. 70. On appeal to the Circuit Court of Appeals the suit was referred back to the District Court under the terms of an order dated December 5, 1935. This was done at the instance of the defendants who wished to have the matter reconsidered in the light of the change in the contract between the Administrator of Public Works and the Finance Board of Greenwood County with respect to the Loan and Grant of the money with which to build the municipally owned power plant on the Saluda River near Greenwood. Certain proceedings were then had in the District Court at Spartanburg, December 12th and 13th, 1935. Upon the case going back to the Circuit Court of Appeals it was argued and decision rendered. This decision, reported in 81 Federal (2nd) 986, was in favor of the defendants generally and reversed the District

Court. Upon appeal to the Supreme Court, the Supreme Court found that there had been substantial irregularities in procedure which it could not overlook and remanded the case to this Court with directions. The final paragraph of the Supreme Court's opinion reads as follows:

(755) "Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced. The cause was heard in the Circuit Court of Appeals upon a record improperly made up. That the cause may be properly heard and determined, we reverse the decree of the Circuit Court of Appeals and remand the cause with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts, and that the cause be retried upon the issues thus presented.

"We express no opinion on the relevancy or effect of the evidence, or otherwise upon the merits."

The Mandate ends with the following:

"On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, reversed.

"And it is further ordered, That this cause be, and the same is hereby remanded to the District Court of the United States for the Western District of South Carolina with directions to vacate its decrees and for further proceedings in conformity with the opinion of this Court.

December 14, 1936.

"You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this Court, according to right and justice, and the laws of the United States, ought to be had, the said writ of *certiorari* notwithstanding."

PRESENT STATUS OF THE SUIT.

Initially, therefore, we find the problem of ascertaining with accuracy the status of the suit as it stood before this Court in January, 1937, when the Mandate was actually filed in the office of the Clerk for the Western District of South Carolina. Various contentions are made thereabout but the Court is of the opinion that the case is back here for a trial *de novo* upon reformed pleadings. The reformation in the pleadings, responsive to the changes in the factual situation and resulting largely from the substitution of the new contract for the old, have been made and allowed by this Court. These (756) changes in pleadings were made as a first step in the retrial of the case after return to the District Court. Upon the case being assigned to the undersigned Judge for hearing and decision attorneys for all parties promptly appeared before the Court on January 19, 1937, and after considerable discussion of the meaning of the Mandate of the Supreme Court, the following changes were made.

On that date this Court signed an order, pursuant to the mandate, vacating the previous decrees of this District Court. The order in the second paragraph thereof allowed the defendants three days within which to file supplemental answers; the short time being accounted for by the desire for expeditious trial. The plaintiff was allowed ten days in which to file a reply to these supplemental answers. It was understood and conceded by all that these changes in the pleadings were the changes which were proper to carry out the following instructions contained in the opinion of the Supreme Court, to-wit:

"That the cause may be properly heard and determined, we reverse the decree of the Circuit Court of Appeals and remand the cause with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of the *existing facts*, and that the cause be retried upon the issues thus presented." (Italics ours.)

As a matter of substance the issues thus presented are properly stated, we think, in these supplemental answers and the resulting reply. The order signed by this

Court on January 19, 1937, preamble omitted, is set forth in full as a note in the margin.

After much argument and discussion of the exact status of the case, this Court is of the opinion that none of the former rulings of the District Judge, nor of the Circuit Court of Appeals on questions of either fact or law constitute findings and decisions which are now binding upon this Court, on the doctrine of the "law of the case". Confessedly the opinion of the Supreme Court of the United States is not the law of the case, nor does (757) it afford us binding guide for the decision of questions of law and fact, so far as the merits are concerned. The opinion declares that the decision of the Court, dealing with the procedural questions, is in no way binding on the lower Courts on the questions of admissibility of testimony, factual findings or decision of the several definite legal points involved. We find in the opinion words which positively negative such intention. The guidance which we get, therefore, from the previous decisions of the District Court, the Circuit Court of Appeals and the Supreme Court is that which learned opinions of able Courts always furnish from the standpoint of reasoning and decision about the matters involved in a controversy. Decisions in the previous history are not, in our view, binding on the theory of the law of the case. We, therefore, have entered upon the trial of this case impressed with the duty and responsibility of trying it *de novo*, which we believe is the force and effect of the opinion of the Supreme Court and the definite wording of the mandate remanding the case to this District Court.

NOTE 1: NOW, THEREFORE, in pursuance of said mandate, it is Ordered, Adjudged and Decreed as follows:

1. That the said decrees of this court entered in this cause on August 26, 1935, and on December 21, 1935, be, and the same hereby are, vacated, to the end that further proceedings may be had herein in accordance with said mandate.

2. That the defendants be, and they hereby are, allowed three days from the date hereof within which to file supplemental answers. and that the plaintiffs be, and they are hereby allowed ten days hereafter within which to file replies to said supplemental answers.

3. That further proceedings be had herein in conformity with the opinion of said Supreme Court, and that the parties may apply, upon due notice to this court, for such other and further orders and directions as may be necessary.

This 19th day of January, 1937.

J. LYLES GLENN,
United States District Judge.

Our failure, therefore, to be controlled by the previous opinions, previous findings of fact and conclusions of law is not to be construed in any way as lack of respect for the District Court or the Circuit Court of Appeals, but is to be construed as the result of independent thinking under a sense of responsibility for the decision of this case in a *de novo* fashion. It is contended that the findings of fact as rendered by the District Court are binding on this Court. We may adopt and use some of them and to that extent will feel ourselves indebted to His Honor Judge Watkins for the painstaking and able work which he has previously done, but we do not conceive that we are bound by them. During the course of this trial evidence was introduced which was not before him, we have allowed evidence which he did not allow to be introduced and manifestly it cannot now be said (758) that the findings of fact on the first trial are binding upon us.

It must be also declared, and the defendants' counsel are very frank in their admission thereabout, that the opinion of the Circuit Court of Appeals as rendered on February 22, 1936, and reported in 81 Federal (2nd) 986, is itself not binding upon this Court vested with the responsibility for the retrial of this case. We think that this would follow from the application of well settled principles of law, but we think it also follows from the definite wording of the opinion and mandate of the Supreme Court. If the findings of fact as made by the previous District Judge were binding upon us, or if the opinion of the Circuit Court of Appeals constituted the law of the case our problem would simply be to combine the two binding factors into a formal decree and make it effective by signing it and filing it in the office of the Clerk. Unfortunately no such easy solution of the controversy involved in this suit is possible to this Court. The very statement of such a solution, involving as it would the shifting of responsibility to abler and more honored Judges, is a temptation, but we do not conceive that such a course is possible here—it is not permitted by the law—it would not be in obedience to the mandate of the Supreme Court.

While counsel have not conceded that this statement of the status of the case before this Court is altogether correct, they have proceeded to the trial and argument of the case with full knowledge that the foregoing is a

statement of the Court's view thereabout and they have not been misled into trying the case without knowing that the Court was considering it from the very beginning as a trial *de novo* on reformed pleadings. An examination of the record plainly shows that the Court fully advised counsel for all parties of its views thereabout and the trial was conducted with this view constantly in the minds of all participants. So far as the presen-
(759) tation of the evidence is concerned, however, the Court is indebted to counsel for stipulations which saved a great deal of time and which presented to this Court, receiving it as *de novo* evidence, much of the evidence in exactly the same shape as it had been introduced on the first trial. For the fine spirit of cooperation and helpfulness, we commend counsel for all parties. In this regard this Court cannot go farther without expressing its gratitude and admiration for all counsel—the trial was had in four days which would otherwise have taken four weeks. This evidence was received by the Court as if being offered originally before it and we make this plain because the evidence presented in the trial of this case falls into several classes so far as its history is concerned. For example, there was the testimony originally taken before the Master, there was testimony taken before Judge Watkins in Spartanburg in December, 1935, pursuant to the remand order of the Circuit Court of Appeals, and finally there was the evidence actually introduced for the first time before this Court, hearing and seeing the witnesses originally. Where any of the evidence by stipulation was received by this Court trying the case in February, 1937, at Rock Hill, South Carolina, which had previously been received into the case either as being taken by the Master or being taken by Judge Watkins in Spartanburg, it was received by this Court as being original evidence introduced directly before the Court itself. The stipulations simply removed the necessity of producing the witnesses again or reading again into the record of lengthy documents. We trouble ourselves and the readers of this record to make this plain in the hope that again there may be no misunderstanding as to the ideas of procedure which were entertained by the Court trying the case. It would be grievous if this Court were to leave the situation in an indefinite state so far as the status of the case and the way in which the evidence was received are concerned.

(760) ANALYSIS OF THE LEGAL ISSUES.

We have in the foregoing paragraphs stated the history of the case up-to-date and our conception of its present status. These suits by utilities seeking injunctions against the Federal Emergency Administrator of Public Works and local agencies who are planning to build local power plants with federal loans and grants are now fairly common. A number of them have been before Circuit Courts of Appeal but none except this case has heretofore reached the Supreme Court of the United States. The issues are well understood by the bench and the bar and the public generally for that matter.

This particular bill in equity was filed in this Court against Greenwood County and its Finance Board seeking an injunction against the construction of a municipally owned power plant near Greenwood. The power plant which was to be built with money coming from a loan and grant agreement with the Federal Emergency Administrator of Public Works was to be a hydro-electric plant with a dam across the Saluda River at a location popularly known as "Buzzard Roost". Mr. Ickes, as Federal Emergency Administrator of Public Works, was made a party defendant by order of this Court dated December 4, 1934.

The bill asked for a temporary and a permanent injunction against the defendants going forward with this project on the ground that it would be bringing irreparable injury to the plaintiff, which company is engaged in the sale of power in Greenwood, Laurens and Newberry Counties, to which area the new plant proposes to furnish electric power.

It is asserted that the plaintiff is entitled to relief on arguments which are summarized as follows:

First, that the plaintiff has a right to bring this suit and ask for an injunction against the irreparable (761) injury about to be sustained from competition and indirect but nevertheless actual and substantial regulation.

Second, that the statutes on which the action of the Administrator and the County are based do not, when

properly construed, authorize what the Administrator is undertaking to do in this case.

Third, that these statutes properly construed even if they do embrace what is sought to be done here are unconstitutional and void. Three reasons for their unconstitutionality are set up. First, that the statutes involve an unconstitutional delegation of legislative power to the administrative agency. Second, the thing sought to be done by the Administrator and the local agency with the expenditure of federal funds is not within the powers delegated to the federal government under the Constitution. Third, that when the nature of the thing sought to be accomplished is viewed in the light of its reasonable, probable and even necessary result, it amounts in substance to an invasion of the powers reserved to the states and to the people under the Ninth and Tenth Amendments to the Federal Constitution; that the net result of the whole scheme, in which the contract is an essential but not an all inclusive part, operates to bring about a result that is inadmissible in view of the Federal Constitution.

The bill is answered by the contentions on the part of the defendants that the expenditure is justified under the General Welfare Clause of the Constitution as construed in the case of *United States* vs. *Butler*, 297 U. S. 1. That in any event the appropriation is made primarily for the purpose of relieving unemployment, both direct and indirect, and is therefore for the General Welfare. That in any event there is no coercion by the federal agencies and that the loan and grant are only made upon (762) the application of the local agency, acting freely and voluntarily, and that the federal government is no more than a giver of gifts and a buyer of bonds. The final answer is that in no event is there any invasion of the Ninth or Tenth Amendments or any of the reservations of powers to the people and the states which are found within the Constitution. By way of answer, it is asserted that whatever regulation may result, such regulation is so incidental and so remote that it is not the type of regulation of intrastate activities which is beyond the power of the federal government. Finally the answers say, adopting the legal positions taken by previous Courts, that the only damage resulting to the plaintiff would be damage from competition *per se* and

amounts to *damnum absque injuria*. The argument is made then that the plaintiff is in no way entitled to the injunction sought because no right, legal or equitable, is about to be violated.

In our opinion the higher Courts have attached considerable importance to the changes which have been made in the contracts evidencing such loan and grant agreements between the Administrator and the local authorities. In the instant case, the real heart of the Supreme Court's remand is found, we think, in the fact that there had not been sufficient independent treatment of the effect of the change in the contract. Had the Supreme Court not considered that the change effected between the first trial and the hearing before Judge Watkins in Spartanburg in December, 1935, was of great importance it would hardly have remanded the case for a trial *de novo*.

It is plain, therefore, that the solution of the problem will turn largely upon the interpretation of paragraph 12 of the loan and grant agreement dated November 30, 1935, because paragraph 12 is the substance of the change that was effected by the new loan and grant agreement. We cannot treat lightly the insertion of this paragraph in the contract. Confessedly also it was an attempt to (763) remedy the original vice in the Administrator's legal position to which attention had been called by the opinion of Judge Watkins and other decisions of Federal Courts. The curative effect must, therefore, be liberally interpreted. On the other hand, to state the plaintiff's contention briefly, the parties cannot by the insertion of a carefully worded paragraph cure a defect which permeates the entire program of the Administrator and set out in the contract as a whole. In short and to be specific, if the only reasonable, the necessary and the inevitable effect of the contract as a whole, and the fulfillment of it in a reasonable way is to defeat the intention expressed in paragraph 12, then it would be substituting words for substance to allow paragraph 12 to control our Findings of Fact. In short the government and the Finance Board cannot say in paragraph 12 that they have no intention of allowing the Administrator or his representatives to have anything to do with the control and the operation of the plant, if the only reasonable and inevitable consequence of the operation of the plant under the contract will be to bring about this result.

Words in a contract which negative the whole proposition and scheme of the activities dealt with by the contract as a whole cannot be allowed to control the interpretation thereof. It is significant in this connection to point out that Mr. Ickes, himself, confesses that paragraph 12 was drawn after the reading of the Court decisions and frankly admits that it was an effort to cure, at least in words, the vice which had been found by two Courts to be inherent in the original contracts. We, therefore, do not subscribe to the argument advanced from time to time by counsel for the defendants that the whole inquiry is put at an end when our attention is directed to paragraph 12 of the contract of November 30, 1935. We must still investigate the factual question of what is the natural and probable and the inevitable effect of the construction of the plant and the carrying out of the contract as a whole. To fail to do so would be stultifying (764) ourselves and solacing our consciences by attributing to the words used in paragraph 12 a magical, curative effect which it is impossible to attribute to them. The fact that the Administrator says that he will no longer seek to control the rates charged by the Finance Board of Greenwood County, that he will no longer require the passage of formal resolutions as to rates, is not going to destroy the dam when it is constructed, nor will the carefully guarded words found in paragraph 12 stop the flow of electricity along the lines to be built with the money furnished under the terms of the contract. So, welcome as it would be to find such an easy solution to the difficult case, we cannot in honesty say that the change from the original form, confessedly vicious, to the form found in paragraph 12 disposes completely of the issues raised by the plaintiff's bill. We must investigate the entire factual situation and say whether or not paragraph 12 can stand up legally and constitutionally when the rest of the contract and its natural and probable consequences are subjected to the tests which are brought into play by the issues raised in the pleadings. A man is presumed to intend the natural and probable consequences of his acts. Furthermore when simultaneous statements made in a semi-official manner evidence the intention to accomplish a result which is claimed to be illegal; when even the sworn testimony in an open Court of a Cabinet Officer admits that the natural and probable result of the construction

of such plants will be to indirectly bring about the regulation of rates charged by local companies, then the declaration of an intention to not control the rates of local utilities can hardly be said to furnish a complete answer to the factual inquiry. So regardless of the final decision of the entire case, it is plain that the plaintiff is entitled to have the case considered and the decision made from the evidence adduced on the entire case and not to be given as a result of well chosen words contained (765) in paragraph 12 alone. Confessedly the original contract reserved to the federal agencies powers which would have vitiated the whole program. The question now before us is, does the reformed contract so cure this vice as to remove the constitutional weakness of the whole program? It is true that the contract is not the entire case but it is the controlling piece of evidence in the case because the contract fixes the rights of the Administrator and the Finance Board of Greenwood County. We must take the contract as it now exists and are not free to speculate about the changes in the contract which may be made in the future. Should a substantial change be made then there would be a substantial change in the evidence to be presented to a Court.

As Courts have considered these cases in which utilities have sought injunctions against the building of municipally owned, competitive and duplicate power plants with federal money there has developed a line of decisions in which the decision has turned on the point that the plaintiffs are not entitled to injunctions regardless of the constitutionality of the basic statutes involved. This doctrine has been especially applied in the following cases: *Duke Power Company* vs. *Greenwood County,* 81 Fed. (2d) 986 (C. C. A., 4th); *Arkansas-Missouri Power Co.* vs. *City of Kennett,* 78 Fed. (2d) 911 (C. C. A., 8th); cf. *Allegan* vs. *Consumers Power Co.,* 71 Fed. (2d) 477 (C. C. A., 6th); *Kansas Utility Co.* vs. *City of Burlington,* 44 P. (2d) 223; Alabama Power Case just decided by the Court of Appeals for the District of Columbia.

The underlying principle of these five decisions is this as we understand it, that no matter how the Administrator may have exceeded his constitutional powers, no matter even if the statute on which he acts is unconstitutional as applied to this kind of action nevertheless that the plaintiff utilities whose damage is sustained

solely by reason of competition are about to sustain a
(766) damage which is "*damnum absque injuria*" and, therefore, have no cause of action. To state it as one of the counsel has stated it in arguing two of these cases to this Court, that the injunction of competition in the stream of proximate cause injects an insulation which protects entirely and completely from legal liability. It is said, when we read these decisions, that no cause of action will lie because there has been no invasion of any legal or equitable right of the plaintiff companies. It is said that no invasion of right is shown because the competition to be furnished by the municipally owned plant is in itself legal. We are endeavoring to ascertain and to state the reasoning which underlies all of these decisions for unless the fundamental principle is sound, then the decision of this case cannot be rested on such principle simply because it may be fitted conveniently into a jig saw puzzle in which the stated cases comprise the remainder of the desired figure. The idea of case law is carried to extreme perhaps in America but we are unwilling to decide the case merely because this case may fit conveniently into the pattern already drawn by other decisions. The fundamental principle is this, that the law is so jealous of protection of competition that where the damage to the plaintiff companies depends entirely upon damage arising from competition, whether such damage be actual destruction of plaintiffs' business or indirect regulation of earning power, there no cause of action will lie for conduct which in any way aids or abets such competition. In so many words do we understand the decision of the Circuit Court of Appeals of the Fourth Circuit. So spoke the Court of Appeals of the Eighth Circuit, so spoke the Court of Appeals of the Sixth Circuit and so recently has spoken the Circuit Court of Appeals, as it is now called, of the District of Columbia. Therefore, we must find as follows if we enforce this general rule, that even though the Administra-
(767) tor may be violating the Constitution of the United States in allocating the federal money for this project, even though Greenwood County may be acting unconstitutionally in surrendering its voice in the matter to the federal agency, yet because the net result of all this is simply to offer competition to the plaintiff company, the plaintiff company cannot complain and its rights have not been invaded. On this theory the govern-

ment becomes then, as admitted somewhat reluctantly we observe by Judge Groner, simply a buyer of bonds and a giver of gifts. It is then Greenwood County, a South Carolina municipal subdivision which is the active agent who competes with the Duke Company. That the Duke Company not being protected in any way from competition with a plant owned by Greenwood County has no right invaded, although Greenwood County may obtain the money with which the competition is financed in an illegal manner. To this doctrine the Circuit Court of Appeals for the Fourth Circuit have confessedly subscribed as applied to the facts of this case. The statement of the doctrine has for some time bothered this Court because it seemed to be an actual limitation upon the principle of law which the Anglo-Saxon jurisprudence has regarded as sacred; the principle summed up in the maxim *"ubi jus ibi remedium"*. But an answer to this fear is found in the statement that there has been no invasion of rights because no rights of this character existed. Therefore, the failure of the law to afford a remedy here is not a violation of the sacred fundamental principle. In short, it is said that the utilities are guaranteed by neither state nor federal law to be freed from competition from municipally owned plants and no matter how illegal the construction of the plant may be that, if the only way that it bears upon or has any effect upon the complaining plaintiff is through the channel of competition, then there is no invasion of right. It is declared that there is no *"injuria"* in the strict legal sense (768) of that word. That, therefore, there being no invasion of the right to be protected by any law, there is no duty upon the law to afford a remedy. If the foregoing reasoning is correct, and still our sense of justice is offended, the answer is that the sanction is political and legislative and not judicial.

While we do not wish to be understood as following, in our thinking, all of the cases cited by the various Courts of Appeal, we cannot lightly consider the fact that such a precedent has been laid down by so many eminent Courts. Particularly do we remind ourselves at this junction, and the chance reader of this opinion as well, that the majority of the Circuit Court of Appeals of this Circuit has already said that this is the law applicable to this situation. In the earlier paragraphs of this opinion we have stated that we do not consider this

former opinion as being the "law of the case" in the strict binding sense of that term, we do think, however, it is correct to say that where the majority opinion of the Appellate Court of this Circuit has already declared the rule of law applicable, there certainly must be some substantial change in the factual or legal situation to justify this Court in refusing to follow such an opinion. On this phase of the case there has been no change in the factual showing of any importance at all. The evidence on the question of competition and reasonable inferences to be drawn therefrom are the same today before this Court as they were when the Circuit Court of Appeals of the Fourth Circuit wrote its opinion in February of 1936. Instead of there being a change in the law on this phase of the case, the position of the Circuit Court of Appeals as there set forth now has the endorsement of three other Courts of equal rank. Therefore, this Court should not hesitate because of some small doubt which it may entertain as to the correctness of this legal proposition. To state the doctrine in its final form we quote from the Circuit Court of the Eighth Circuit (769) in the Kennett case:

"We know of no rule of law, however, which permits one indirectly hurt by the government expenditure to question the power of the government to make it. In fact, the rule is to the contrary."

We do not agree that the case of *Railroad Company* vs. *Ellerman*, 105 U. S. 166, supports the conclusion for which it is cited as authority, but this does not keep the rule as abundantly sustained by other authority from being binding upon us. Furthermore, we are greatly struck by the following observations of Judge Soper:

"The Power Company has such an interest in the business as to justify its suit. The practical effect upon his valuable property interests is manifest. It has an interest far more weighty than that of a federal taxpayer, which in *Frothingham* vs. *Mellon*, 262 U. S. 447, was held to be too remote, uncertain and insignificant to entitle him to injunctive relief against an invalid federal appropriation. The plaintiffs here conform to the rule laid down in that case since they show not only that the act by the Administrator was invalid, but that

they are in danger of sustaining a direct and substantial injury therefrom."

However, after considering the whole matter and after full realization that substantial damage is certain to result to the plaintiff company here within a limited area, we are forced to the conclusion that such damage so far as it results from competition alone results from no invasion of the plaintiff's rights; that, therefore, the damage is *damnum absque injuria* and that the plaintiff is not entitled to the relief sought.

When the Duke Power Company made its investment in and around Greenwood it was charged with the knowledge *the* such investment ran the risk of being damaged by competition. It was in the eyes of the law charged with the knowledge that such competition might come either from another private utility or that it might come from a municipally owned plant—competition from either source would be legal under their franchise and under the law of South Carolina. The higher Courts have now held that the financing of such competition by loan and grant from the federal government does not render such competition illegal and it must, therefore, follow, if this proposition is correct, that the plaintiff company is not entitled to its injunctive relief as sought in this bill.

(770) All of the cases taking this point of view have relied strongly upon the reasoning found in *Puget Sound* vs. *Seattle*, 291 U. S. 621. The opinion in that case does seem to sustain the decisions which rely on it. There the utility company resisted the tax because the city operated a plant, exempt from taxation, in competition with the private enterprise on which the tax was levied. Dealing with this question afforded the Supreme Court an opportunity to discuss the general question of competition between municipally owned plants and privately owned plants. We find for example the following language:

"In conducting the business by state authority the city is exercising a part of the sovereign power of the state which the Constitution has not curtailed. The decisions of this Court leave no doubt that a state may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise, levy a

tax to support it. *Green* vs. *Frazier,* 253 U. S. 233; *Jones* vs. *Portland,* 245 U. S. 217, and compete with private interests engaged in a like activity. *Standard Oil Co.* vs. *Lincoln, supra; Madera Water Works* vs. *Madera,* 228 U. S. 454; *Helena Water Works Co.* vs. *Helena,* 195 U. S. 383."

Over on page 625 we find language very helpful in the consideration of this case:

"The injury, which appellant fears may result, is the consequence of competition by the city, and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. * * * Legislation may protect from the consequences of competition, but the Constitution does not. *Helena Water Works Co.* vs. *Helena, supra; Vicksburg* vs. *Henson,* 231 U. S. 259. The Fourteenth Amendment does not purport to protect property from every injurious or oppressive action by a state. *Memphis Gas. Co.* vs. *Shelby County,* 109 U. S. 398, 400; *St. Louis* vs. *United Railways Co.,* 210 U. S. 266, 276; nor can it relieve property of congenital defects, *Madera Water Works* vs. *Madera, supra,* 456. It does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different. Those were risks which appellant took when it entered the field. No articulate principle is suggested calling for the conclusion that the appellant is not subject to the same risks because the competing business is carried on by the state in the exercise of a power which has been constitutionally reserved to it from the beginning."

(771) So far as competition *per se* and the resulting damage are concerned we are, therefore, willing to follow the above-cited cases and we think that their reasoning is at least highly persuasive, on the whole case, but right to be free from competition is not the only right which the utility company has under our federal and republican form of government. The competition complained of and which does cause an actual loss in dollars and cents by reason of the loss of business is a loss which might come under the legal classification of

damnum absque injuria; however, the instant plaintiff has another right—it has a right to have its intrastate activities regulated by a state agency if regulated at all. Here we may find the Latin phrase inverted and we may come to a situation aptly described as being *"injuria sine demno"*. Whatever regulation of intrastate transactions is to be had must be state and not federal regulation, if, therefore, we concede that no invasion of right arises from the competition *per se* and the resulting loss in money, this does not necessarily mean that the right to insist upon state regulation rather than federal regulation is not an independent right existing entirely apart from whatever rights the company may or may not have to be free from competition. Quite apart from the loss of money due to competition the company may sustain an *"injuria"* by reason of having its right of state regulation taken away and federal regulation substituted therefor. In other words, the right to live under a republican form of government is a right which no one would gainsay, the right to live under our federal system of government is a right which no one would attempt to deny to any person, natural or artificial. One of the rights under our federal system of government is the right to have intrastate matters and transactions controlled by the local government. The question is not which one of the controls is more beneficial to the particular person or his business. It may be that the state regulation of the utility is more to be dreaded than the federal (772) regulation. Historically the utilities have been complaining more of state regulation and under the Fourteenth Amendment have been seeking protection of the Federal Courts from the hardships of state regulation. Now the utility complains and says that the result of the whole scheme is to violate *its absolute right* to have these matters regulated by state authorities. It takes the legal position that regardless of whether the effect is beneficial or *deterimental*, this absolute right, guaranteed by the Federal Constitution, is about to be violated and that there is a threatened injury to this absolute right essentially constitutional in nature. So we say when this view is carefully considered that this Court does not concede that the case can be dismissed purely on the competition theory. Reluctant as we are, we are forced to the conclusion that the opinion of the Circuit Court

of Appeals for the Dstrict of Columbia does not examine the question of the degree to which the whole plan and its consummation will violate an utility company's absolute right to have its business, so far as the business is purely intrastate, regulated by state and not federal agencies. It is our view that it would be a violation of the Tenth Amendment to accomplish federal regulation of the local intrastate transactions to a substantial degree and thus displace state regulation even if this result was brought about through a loan and grant agreement resulting in the building and operation of a municipally owned and federally aided power plant. Indeed it was admitted during argument that the federal government would have no right to come down to Columbia, the state capital, and set up a federal board for the control of utility companies operating in South Carolina. This would be the extreme of federal regulation and would be clearly unconstitutional. It was further admitted that if in the contract and in the scheme of operations the federal government sought and obtained, whether by purchase of compliance or by demand of conditions precedent, rights which amounted in substance to a reservaton of control by the federal government this (773) two would be unconstitutional. The Administrator himself has practically conceded this question by excluding from the later contract all of the reserved powers over rates which were included in the original contract. Now, if we find that the inevitable, direct and substantial result of the loan and grant agreement and its consummation will be substantally to supplant state regulation with federal regulation, then we are forced to hold that the absolute right of the plaintiff has been invaded and if imminent danger and loss will follow then the plaintiff is entitled to injunctive relief. But if from the facts of the case it appears that the plan as a whole is constitutional under the general welfare clause and under our theory of one sovereignty aiding another, hereinafter more fully developed, and if the regulatory effect is merely incidental, immaterial and remote then we must deny the desired relief. In short, if regulation is so essentially a part of the scheme as it was in the Butler case as to vitiate the entire program, the decision must be for the plaintiff. If on the other hand the very nature of the resulting regulation is slight and incidental and

does not amount to a substantial supplanting of state regulation by federal regulation as a mater of fact, then we must deny the injunction and decide for the defendants.

Every federal expenditure which aids a local enterprise has some regulatory effect on the conduct of competitors. The question of degree is the controlling consideration. A man has a privately owned swimming pool as a part of a recreational enterprise in a small town, the American Legion Post in the small town gets an appropriation from the Public Works Administration to build a swimming pool within competitive distance. We agree that the private owner cannot complain of the loss of money due to direct competition, he has no right to be protected from such competition though financed by federal aid, but if the indirect regulatory effect goes so (774) far as to actually and substantially amount to a regulation by the federal government instead of by the state, then there would be an invasion of rights which would offend against the Tenth Amendment and against the whole spirit of the Federal Constitution. It is on this question of degree that we think that the plaintiff has failed to make out a showing in the particular case in the light of the existing second contract. The confessed attempt of the Federal Administrator to control the rates of the Duke Power Company through control over the rates to be charged by the Greenwood County Finance Board is removed by the change in the wording of the contract so far as the claim of right is concerned. The actual and substantial control is removed we think by a decision on the weight of the evidence and understanding of its legal effect.

As pointed out above every federal expenditure for the benefit of a local enterprise will always have some effect by way of competition on similar enterprises serving the same community. Illustrations carrying this truth to extremes could be cited—the soldier with his bonus is better able to compete with his neighbor across the street who has received no bonus and yet no one would dare to say that such competition was illegal. Many federal expenditures may have some slight regulatory effect on the business of those in competition with the recipient of the federal gift. Regulation is after all a relative term, but federal regulation to supplant state

regulation so as to render such federal regulation unconstitutional must be substantial and direct, not speculative and remote. So when viewing it from this angle, as when viewing it from every other angle, we are reminded that the solution of the case as a whole from the constitutional standpoint depends upon the degree and extent to which the whole scheme, appropriation by Congress, allocation by the Administrator, acceptance by the local Finance Board and the reasonable and prob-
(775) able effect of all of this tends to supplant state regulation with federal regulation.

So we must now examine the evidence on the regulatory feature of the case. It is here that the testimony and argument about the "yardstick" demands our attention. We think that the plaintiff has greatly magnified the importance of the yardstick in the case. To begin with the regulatory bodies of South Carolina being specialists in the business will certainly have acumen enough to understand that so far as the Greenwood project furnishes a yardstick to measure rates generally, it is a yardstick emanating from a very peculiar type of plant. We are certainly safe in assuming that the specialists serving on the South Carolina Public Service Commission or like body will understand that the plant is one financed entirely by loan and grant from the government. We cannot assume that the commission or regulatory body of the state is going to arbitrarily overlook this prominent factor in dealing with the regulation of the privately owned utilities operating in South Carolina. There is certainly nothing illegal in the study of the rates which will be charged by the new project and nothing illegal in the ascertainment of the rates which this project would justify. If there was any certainty that a yardstick when once ascertained would be used as a basis of control and regulation of the plaintiff's rates, the situation would be quite different. Rates are as a matter of practice and constitutional guarantee fixed by regulatory boards after consideration of investment and nature of service. We cannot assume that the South Carolina Public Service Commission or other regulatory body is going to stultify itself by failing to consider the major difference in the nature of the investment involved in the two plants. There certainly is nothing wrong in any government, state or national,

spending money to investigate the facts about a given business. Time will be to complain if after certain facts or yardsticks are ascertained, a regulatory body vested with the power seeks to apply such yardstick in an arbitrary, discriminatory and unjust manner. To justify (776) the granting of an injunction on the yardstick theory of the case, the plaintiff must show this Court not merely that the proposed rates will supply the yardstick, or furnish from a friendly source information about the costs of producing electricity, but that this yardstick when once ascertained is about to be used by a regulatory body in an illegal manner.

We, therefore, find as a fact, which we have stated independently in our separate findings of fact filed herewith, that the evidence does not show that the construction of this plant at the Buzzard Roost location on the Saluda River will bring about such a substantial control and regulation of the plaintiff's rates as to in fact and substance supplant state regulation thereof by federal regulation. We wish to make it plain that this is a ruling on the force and effect of the evidence with respect to this particular case. It may well be that a continuation of the policy to a very widespread extent might accomplish the result which the plaintiff claims is accomplished here.

The defendants' contention that the appropriation, loan and grant and use of money for the building of the power plant is justified under the general welfare clause of the Federal Constitution.

This phase of the case is the one most strongly relied upon by the defendants. Of course, this contention has recently been given a new meaning by the clear acceptance of the Hamiltonian theory of the General Welfare Clause by the Supreme Court of the United States in the case of *United States* vs. *Butler,* 297 U. S. 1. That decision sets at rest the old controversy as to the meaning of the General Welfare Clause in its relation to other clauses of the Constitution vesting power in the National Congress.

With all due respect to other courts, we approach this phase of the case from a slightly different angle from (777) that used in previous decisions. Citation and in-

creased importance attached to this new found power of expenditure for general welfare is not to be, in our opinion, a complete justification for all expenditures which Congress may see fit to make and which may be found in some way to be for the general welfare. There must be some limit to this power of expenditure. Without enumerating them all, the most important limitation on this power immediately suggests itself to us. The general welfare power may not be exercised to disturb the balance between the states and the federal government which exists under our constitutional system. The general welfare clause would become the whole Constitution if it could be used as a source of power to enable the Federal Congress to subvert the whole scheme of our federal government and thereby completely substitute federal sovereignty for state sovereignty. We think that a proper interpretation of the general welfare clause depends upon a proper appraisal of the two sovereignties involved. Certainly so far as the decision of this case is concerned, it is important to read the general welfare clause in the light of the question of sovereignty. The inclusion of the general welfare clause in the Constitution and the broad interpretation recently given it by the Supreme Court does not in any way disturb the inherent sovereignty of the states making up the Federal Union. But while we, as much as any Court, desire to maintain the integrity of the state and see all constitutional questions from the standpoint of one who realizes that the integrity and independence of the states must be maintained, yet we do not blind ourselves to the great benefits which have come from the federal government. While state did not lose their inherent sovereignty by adopting the Constitution, on the other hand the sovereignty of the Nation, derivative as it is, is not the sovereignty of some far off, distant, unsympathetic power. The federal sovereignty was created in the interest of the other sovereignties and was vested with those powers that were necessary to enable it to perform those functions best to be performed by a (778) centralized authority. Courts have found it necessary from time to time to locate the authority under our Constitution to perform certain functions and the very difficulty which the Courts have in drawing the exact line is itself a proof of the intimacy of the

sovereignty of the federal government with the sovereignty of the respective states. The contract embodied in the Constitution is an intimate one and must be construed in that light. The Constitution is not a non-intercourse document, it is a document which recognizes that there will be an intimacy between the states and the newly created federal sovereignty. The purpose of creating the federal government was "federal" in the original sense of that word; the states were to be tied together and the resulting compact was one of intimacy and not one of separation. We think, therefore, that there is nothing illegal or wrong from the constitutional standpoint in the fundamental principle that one sovereignty may aid another sovereignty. Certainly if the independent sovereignty of the United States may aid an independent sovereignty of an ally in war times, it should be able to aid the sovereignty of South Carolina from which it in turn draws some of its power. We cannot see why fundamentally one sovereignty may not aid another sovereignty in the accomplishment of a lawful objective. The fact that the aiding sovereignty is a federal government to which powers have been delegated in a written Constitution does not offend in any way against the fundamental conception that one sovereignty may aid another. The limitations on this aid under the United States Constitution are to be found then in the terms of the Constitution itself. The general welfare clause, therefore as we see it, must be understood in the light of this background and be declaratory of these fundamental truths of constitutional law. The power to aid arises, we think, from a higher source than the general welfare clause itself. It arises from the nature of the sovereignty involved and is justified by the occasion provoking its exercise. Sovereignty implies the location (779) of power and with this power goes responsibility for the welfare of the people themselves who are the original depositories of the power. The transfer of sovereignty from the people to the government is justified only on the grounds of necessity and the use of sovereignty is justified by what is necessary and best for the welfare of the whole people. This is the fundamental teaching of the Rousseauan idea of sovereignty which peremeates our national and state governments. The general welfare of the people of the United States is the

common concern of both the federal sovereignty, limited as it is, and of the respective state sovereignties, inherent though they be. The people of the United States are in the very nature of our government the proper destinatories of legislation passed for the general welfare.

Extended discussion by this Court of its ideas of sovereignty and the constitutional issues involved would serve no useful purpose. We have developed them to some extent because we think it is necssary to do so to make plain our decision in this case. It seems that the question is to be decided in the last analysis by deciding whether or not the case presents a situation controlled by the majority opinion in the case of *United States* vs. *Butler*, 297 U. S. 1. If we come to the conclusion that the regulation of the rates of the plaintiff company is such a direct, necessary and inevitable result of the course of conduct here contemplated as to fall within the condemnation of that opinion, then we have no alternative but to base our decision fairly and squarely on the Butler case and find for the plaintiff. If on the other hand, assuming that the plaintiff has a right to complain at all, we find that the regulation of the plaintiff's rates is a mere incident and collateral effect and not substantially the direct result of the intended course of conduct, then we must deny the relief sought by the plaintiff.

Somewhere between the two bold statements of the (780) extreme positions, this case lies. The first one is the proposition laid down by the plaintiff and admitted by the defendants. Congress cannot come into South Carolina and confessedly regulate the sale of electrical energy by a private utility to a private consumer. Such a transaction is an intrastate transaction according to common sense and according to the decision of the Higher Courts, and Congress cannot rob the State of South Carolina of this right to control such transactions. The rule goes further to hold that submission by the state and consent and acquiescence by the state authorities cannot add one whit to the power of Congress over such purely intrastate transactions.

The attempted surrender of sovereignty by a state or the shifting of responsibility in return for financial aid cannot be allowed to justify damage to a private citizen. South Carolina cannot lie down and say that it will

give power to the Federal Congress in return for money and thereby vest regulatory power in the central government which according to the Constitution is left, where it was originally, in the Sovereign State of South Carolina and there alone. This doctrine has been so well stated by Mr. Justice Sutherland in the *Carter* vs. *Coal Company* case that we refer to it here:

"State powers can neither be appropriated on the one hand nor abdicated on the other. As this court said in *Texas* vs. *White*, 7 Wall. 700, 725, 19 L. Ed. 227, 237, 'The preservation of the States, and the maintenance of their governments, as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'. Every journey to a forbidden end begins with the first step; and the danger of such a step by the Federal Government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been (781) thought that such danger lurked behind its plain words, it would never have been ratified."

Such a shifting of responsibility from state to federal shoulders, even if accompanied with the passage of enormous sums of money is forbidden by our Constitution. We digress to say that it is not only forbidden by the Constitution but that it will be the beginning of the end, and may be half the journey toward the destruction of the indestructible states making up our indestructible union. The Supreme Court of the United States condemned the purchase of compliance as the mechanics set out in the AAA statute—every Court must condemn purchase of compliance seeking to accomplish an unconstitutional result, whether the compliance be by individual citizens as in the Butler case or by responsible state officers as alleged in the case at bar.

The defendants on the other hand, in their boldest statement of their position, maintain that the general welfare clause as now interpreted by the Supreme Court in the Butler case is a justification for practically any expenditure that inures to the general welfare of the citizens of the United States.

Therefore, deciding this case by the yardstick which was laid down in the Butler case, we come to the conclusion that no forbidden federal regulation is shown here. In thinking about this phase of the case, we call attention to the fact that even in *United States* vs. *Butler* there was nothing found wrong in the federal government promoting the general welfare by stabilizing the prices of agricultural commodities. The vice lay in the scheme adopted in that it sought to regulate in a far-reaching way intrastate activities. Furthermore, we cannot divorce our thinking about the aid rendered by the central government to the state governments or their subdivisions from practical considerations which are suggested by our national history. Historically the control over the moneys of the United States has been concentrated more and more in the federal government. For some reason the federal government has been comparatively efficient in the collection of its taxes and the securities of the federal government are rapidly absorbed on the money market. Another fact in our national history which is significant in this regard is the Sixteenth Amendment. All authorities on taxation have conceded that the income tax is a definite, easily enforced and productive source of revenue. Taxes are valuable for the raising of revenue primarily and other considerations thereabout are secondary. When the states, wisely or unwisely, adopted the Sixteenth Amendment they then surrendered to the national government the first call on this fertile source of revenue. Many other sources of revenue have been initially tapped by the federal government. So on the basis of fair play it is only right that in time of emergency the central sovereignty in strong position comparatively, should be ready to make available money and credit with which to aid local sovereignties in relief from a nation-wide depression. After all the whole body of the citizens of the United States and their welfare are the ones to be served by the exercise of sovereignty wherever located.

(782)

Relief of unemployment is the phase of general welfare most strongly relied upon in this case. It is the phase stressed in argument, because at the time of the passage of the act and the making of the loan and grant, it was conceived to be the most pressing need of the country at large.

We are constrained to believe that relief of unemployment in and around the proposed plant at the Buzzard Roost location on the Saluda River is not such a pressing need today as it is and has been in other sections. However, we must remember that the theory of relief of unemployment embodies both the direct relief and the indirect from the aid to capital industries. Furthermore, each appropriation for the general welfare must have, as previously pointed out, a place of local incidence. The allocation of this relatively small amount of $2,800,000 for this project is not out of line with the amounts to be spent on similar projects elsewhere in the nation.

(783) Another view of the factual situation seems to us to be significant. Greenwood County lies in the Piedmont Section of South Carolina. Its chief industries are production and manufacture of cotton. By reason of the development of the Piedmont Section of the Carolinas there has been an enormous increase in the last 25 years in the use of electricity in this section. Public records show that there has been an annual increase of 10%. This increase has gone on despite the ebb and flow of general economic conditions. A graph of which we take judicial notice shows that in March, 1933, when conditions were at their very lowest, the consumption of electricity in this section was three and a half times the consumption in January, 1920, when general business conditions in this section registered an all time high. While Greenwood is right in the heart of this section, the evidence shows that in Greenwood County only about 15% of the power is furnished by the Duke System; actually the larger part of the power has been supplied by local cotton mills from steam plants. The evidence supports the contention of the County authorities that while there has been a general movement of textile plants to the South in the last 20 years no new industries of substantial importance have been brought to Greenwood County. The opinion is held by the County that in lo-

cating new industries to consume power furnished by the Duke Company, that company has been minded to place them closer to its center of operations—to the north and east of Greenwood County. They have felt, therefore, that if the County had a municipally owned power plant of sufficient size and built at a low cost the County would be in good position to concentrate upon bringing new industries to Greenwood County as opposed to the whole general section being served by the Duke Company. The increase in the uses of electricity by the urban and suburban residents is patent to all. A service which was regarded as a luxury some years ago is now regarded by (784) all as a common necessity. That a service rendered to inhabitants of a municipality may as a matter of fact so change that the change must be recognized by the Courts has been recently declared in a vigorous opinion of the Supreme Court. There was a time when water was supplied to municipalities by private companies, as the cities have grown a private water company has now become a rarity. Indeed, that a supply of drinking and bathing waters is a proper function of a municipal government has come to be so well accepted that the superintendent of such service has been declared by the Supreme Court to be engaged in an essential governmental function. His services are considered so important a part of the municipal government that the Supreme Court of the United States has held that his income is immune from federal taxation. *Brush* vs. *Comr.*, 81 L. Ed. 443, October Term, 1936. With water so regarded we can see little difference between the service coming in underground in a pipe to a modern home from the service which is furnished by the electric power over wires above ground. So there is nothing novel in the operation of electric service by municipalities or the control of their use by municipal officers. Greenwood County has felt, according to the evidence, that it cannot only control the service to be rendered its present inhabitants but that by an intelligent operation of the plant new capital and new industries can be brought within its confines. Such competition as will result from this development is conceded by all to be lawful competition under the laws of South Carolina, even the plaintiff conceded this in pleading and at the bar of the Court.

CONTENTION OF PLAINTIFF THAT THE ADMINISTRATOR HAS ADOPTED CRITERIA OTHER THAN THOSE SET UP IN THE STATUTE. EVIDENCE RELATING TO THIS PRACTICE.

The plaintiff has offered in evidence a great number of documents as well as some direct testimony showing the manner in which the Administrator or his chief (785) assistants have acted with respect to other projects. This Court has thought that this testimony is admissible.. It is aware that such testimony was excluded by the trial Court in the District of Columbia. It also appears that this question was not dealt with by the Court of Appeals for the District of Columbia in its recent decision. The Circuit Court of Appeals of the Fourth Circuit has not specifically decided the question of the admissibility of this evidence, neither did the Supreme Court express its view thereabout on the occasion of the first appeal in the instant case. It is significant, however, we think that the Circuit Court of Appeals of the Fourth Circuit did in its opinion discuss some of the evidence of this character when ruling on the merits. The plaintiff contends that the evidence is admissible because it tends to show that the Administrator and his assistants, charged with large responsibility, had adopted a course whereby they set up the rate question as a criterion to determine whether or not a loan and grant should be made in a specific case. Of course, the controlling evidence is the evidence relating to the manner in which the instant application was considered and decided but we do think that the evidence of the Administrator's consideration and action on similar applications made under the terms of the same statute are admissible. This is particularly true in view of the wide range of choice given to the Administrator and the fact that the statute was a new statute and, therefore, a course of conduct could only be shown by consideration of the major cases which had been handled by the Administrator under the power given to him by the new statute. But it seems to be largely beside the point whether such evidence is admitted here *of* not, because the evidence constitutes records in other cases which have been decided by the Courts. Manifestly such records could be

resorted to to explain the real force and effect of other decisions even if they were not actually admitted in evidence in this case. It is only fair to comment that where the decisions have been favorable to the defendant Ad-(786) ministrator his counsel have been most happy and willing to make use of those decisions in support of their arguments. Manifestly an offering of the record on which those decisions were based amounts to no more than bringing to this Court "Transcripts of Records" in those cases. But apart from these considerations we think the evidence is admissible for the reasons stated on trial—we thought so on trial and still think so.

This evidence does tend to show two things. In the first place it tends to show that certain agents of the Administrator as well as the Administrator himself were at first very bold in the statement of the criteria they used in approving certain projects and denying others. It does support the contention that the criterion generally used was whether or not it was necessary to build a new competitive plant in order to force down the rates in a given community.

In the second place as testified by the Administrator himself in Spartanburg before Judge Watkins (evidence, which under stipulation is now before this Court as original evidence), there was a gradual recognition that the continued use of such a plan or scheme would endanger the constitutionality of the whole program. We might as well be frank about it, for it is clear that such decisions as Judge Watkins' original decision in this case and the opinion of the Circuit Court of Appeals in the Couer d'Alene case created doubts in the Administrator's own mind as to the wisdom of going too far into the rate question. Repudiation of the original position is abundantly evidenced. To name the major pieces of evidence is simply to remind ourselves of the following:

A. The frank changes in the contracts;

B. The appearance and testimony of Mr. Ickes himself on the rehearing of this Duke case;

C. The restriction of the authority of the Electric Board of Review;

(787) D. The rebuke given to its members;

E. Its final abolition and the memoranda repudiating the authority to make certain statements which had been made by this Board.

We mention all of this because it is plain that there was an original plan to allocate funds for competitive municipal projects largely on the basis of lowering the rates in a given community. If the existing utility lowered the rates voluntarily and was rendering adequate service there would be no need to build a competitive, duplicate plant. Regardless of its effect on the final decision of the case we think that the evidence in this regard is admissible and that it shows exactly what the plaintiff contends that it shows.

But even if there was a well thought-out plan and intention on the part of the Administrator to control rates in this way, this does not in itself render the action in a given case unconstitutional. The political, social or economic reasons behind a course of conduct of the executive officers do not decide the question of the constitutionality of their actions in a given case. Nor does the evidence which shows in a rather vivid way the mental processes through which the Administrator or his responsible assistants have gone mean that they have violated the terms of the statute under which they are acting. The political and social considerations supporting a statute are for the legislative and executive branches of the government. A Court when called upon to decide the constitutionality of such conduct is dealing with a question of power and not wisdom. So with respect to the charges of the violations of the statutory standards, if the Administrator thought about the political and economic phases of the application and intended project before rendering his decision, it does not make the decision rendered a violation of the statute, if the decision is sustainable on other grounds. Alexander Hamilton (788) in his first report on the National Bank argued brilliantly for the bank as being of great value to the trade and commerce of the citizens of the United States. Later Hamilton was called upon by President Washington to render a legal opinion as to the constitutionality of the bank. In this second report we find only an argument that Congress had the constitutional power to cre-

ate the bank. The fact that Hamilton had previously looked at the matter from the political, social and economic standpoint did not detract one iota from the force of his argument on the constitutional power. His arguments on the second question have become accepted as sound statements of American Constitutional Law and have been so regarded for over a century.

So while we may not agree with all that was said by the Administrator or his assistants in regard to the reasons advanced from time to time for the action taken, we cannot for that reason, set aside the decision as to the instant project. We think that this project in Greenwood County conforms to the statutory standards.

UNLAWFUL DELEGATION OF LEGISLATIVE POWER.

As to this contention we feel constrained to follow the decision of the Circuit Court of Appeals of this Circuit as previously rendered in this case, 81 Fed. (2nd) 986. While we are not bound by this on the theory of the "law of the case" we do feel constrained to follow it wthout further comment. However, since this decision and at a time when the question of unlawful delegation of power is being constantly raised before the Supreme Court of the United States, the Supreme Court has laid down the rule in strong language in *Cincinnati Soap Co.* vs. *United States,* opinion delivered May 3, 1937. We find the following language:

"The validity of the act disposing of the tax is also attacked as constituting an unlawful delegation of legislative power. That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appro- (789) priation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. A striking and pertinent example is afforded by the Act of June 17, 1902, c. 1093, 32 Stat. 388, where all moneys received from the sale and disposal of public lands in a large number of states and territories are set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories. The expendi-

tures are to be made under the direction of the Secretary of the Interior upon such projects as he may determine to be practicable and advisable. The constitutionality of this delegation of authority has never been seriously questioned. See *United States* vs. *Hanson*, 167 Fed. 881, 884-885."

While, of course, the statute there under consideration was not exactly the statute involved here, we think that this language is applicable to the statute involved in this case.

NATURE OF THIS SUIT.

This question can be disposed of very shortly. Counsel for both sides have referred from time to time to the nature of this suit. This discussion has been provoked, we think, by an undue importance attached to what has been called in these suits "The Right to Sue".

This Court thinks that there is no mystery about the type of suit brought here. It is simply a suit wherein injunction is sought against state and federal officers to prevent them from invading the constitutional rights of the plaintiff. It also seeks injunction on other legal grounds. This type of suit is so common in our American jurisprudence that there is no reason for misunderstanding as to the nature of the suit. Long ago this type of suit was recognized in law. As early as 114 U. S. 270, *Poindexter* vs. *Greenhow*, the Supreme Court said in discussing this type of suit:

"The ratio *decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of the defense. He is bound to estabish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a de- (790) fendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and warrant for his act. * * * The State has passed no such law, for it cannot; and what it can-

not do, it certainly in contemplation of law, has not done. * * *

"He stands, then, *stripped of his official character, and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defense.* * * * That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the *mere wrong and trespass of those individual persons who falsely speak and act in its name.*"

This decision was followed by *In Re*: Ayres, 123 U. S. 507, and so on down through the decades this type of suit has been recognized and dealt with in many, many cases. It is the familiar type of suit by which the federal constitutionality of state statutes is decided in cases demanding a Three Judge Court. Indeed such a suit is an essential factor in the "Reign of Law" as we recognize it in England and America. It is the procedural method in which persons, natural or artificial, can seek protection from administrative agencies.

No mysterious element is introduced into the case because one of the defendants is a federal officer and the other defendants are a county, existing under the state law, and the members of a board specially created by state statute. The same fundamental principles govern the procedure for hearing and deciding the respective controverses between the plaintiff and each of the defendants. A federal officer may be sued personally to prevent him from enforcing an unconstitutional statute. Such a suit is, as has been decided time without number, not a suit against the government but a suit against the officer. The fact that he may defend on the basis of the statute authorizing his action introduces no mysterious element into the suit. Nor is complexity added because a county and its officers are joined as defendants.

Some suggestions were made by counsel for the de-
(791) fendants as to the applicability of the Eleventh Amendment. Nothing is better settled in American jurisprudence than the rule of law that such a suit as the one here is not a suit against the state so as to deprive the Federal Court of jurisdiction under the terms of the Eleventh Amendment. And that question even is beside the point here for the named defendants are not even,

in our opinion, officers of the state. Greenwood County is a municipal corporation existing under the laws of the State of South Carolina, but that such a municipal corporation enjoys no immunity under the Eleventh Amendment is well settled. The Finance Board of Greenwood County, while a group of men appointed under the terms of a state statute, have no statewide duties to perform and would not, in our opinion, enjoy such dignity as to be protected from suits by the Eleventh Amendment. It is familiar history that the Eleventh Amendment was passed to overrule the decision of *Chisholm* vs. *Georgia*. It has never been successfully contended that the purpose of the Eleventh Amendment was to prevent a person, natural or artificial, from testing the constitutionality of a statute, by bringing a suit against a state officer or against a municipal corporation about to enforce a state or federal statute. From the foregoing, it is certain, we think, that this Court has jurisdiction of the entire controversy here—of all the parties and of all the issues raised by the pleadings.

For the foregoing reasons, which must be read in connection with the separate Findings of Fact and Conclusions of Law which we have filed in keeping with the terms of Equity Rule 70½, we think that the plaintiff must be denied any injunction and that the bill must be dismissed on its merits.

(signed) J. LYLES GLENN,
United States District Judge.

Rock Hill, South Carolina, May 26th, 1937.

NOTE 2: The majority of this opinion was written before Monday, May 24, 1937, and the Court did not have the advantage of the decisions of the Supreme Court handed down on that day on the Social Security Act, but having read these decisions, we find nothing in them that would change our views, but on the contrary there is much that suports the views outlined in this opinion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
(794) WESTERN DISTRICT OF SOUTH CAROLINA.
IN EQUITY.

United States District Court
West'n Dist. of So. Car.
JUN 2 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

Duke Power Company, a corporation organized and existing under the laws of the State of New Jersey, Complainant,

versus

Greenwood County, and E. L. Brooks, S. A. Agnew and E. I. Davis, members of and constituting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

(795) FINDINGS OF FACT.

I.

This bill in equity was instituted in this Court November 7, 1934, against Greenwood County and the members of its Finance Board. Under order of this Court of December 4, 1934, Harold L. Ickes, as Federal Emergency Administrator of Public Works, was made a party defendant.

After the bill of complaint had been amended and supplemented February 4, 1935, this Court, for the reasons set out in its opinion of April 23, 1935 (10 Fed. Supp., 854), overruled the defendants' motions to dismiss by its order of April 29, 1935, and referred the matter to W. M. Walters, Special Master, to take the testimony. Testimony was taken before the Special Master June 12-19, 1935, and reported to this Court.

This Court, for the reasons assigned in its opinion of August 10, 1935 (12 Fed. Supp., 71), granted a decree for injunction in accordance with the prayer of the com-

plaint on August 26th, 1935. The defendants appealed to the United States Circuit Court of Appeals. By reason of the fact that during the pendency of that appeal the Administrator of Public Works and the County entered into a superseding loan and grant agreement of November 30, 1935, the Circuit Court of Appeals, on December 5, 1935, remanded the case to this Court (79 F. (2d) 955). Additional testimony was taken in this Court and the Court by its order of the 21st of December, 1935, refused to vacate the injunction order.

An appeal was thereupon taken by the defendants and under the opinion of the Circuit Court of Appeals of February 22, 1936 (81 F. (2d) 986), the injunction orders of the District Court were reversed and the bill ordered dismissed. The Circuit Court of Appeals, however, granted a stay order on March 17, 1936.

(796) *Certiorari* was granted by the United States Supreme Court on the petition of Duke Power Company, May 18, 1936 (298 U. S., 651, 80 L. Ed., 1379, 56 S. Ct. Rep., 941), and thereafter that Court, without expressing an opinion on the merits, by its mandate issued pursuant to its opinion of December 14, 1936 (81 L. Ed., 149), reversed the order of the Circuit Court of Appeals and remanded the cause to this Court, with directions to vacate the injunction orders of this Court of August 26, 1935 and of December 21, 1935, and *to re-try the case.*

II.

The Mandate from the Supreme Court was dated December 14, 1936, and was filed in the office of the Clerk of Court for the Western District of South Carolina on January 12, 1937. Immediately after the filing of this Mandate by arrangements between the Judges having jurisdiction in the Western District, this case was assigned to the undersigned Honorable J. Lyles Glenn for trial. Negotiations were then had with counsel for all parties with reference to the amending of the pleadings and trial of the case.

III.

This Court, by its order of January 19, 1937, vacated the injunction orders of August 26, 1935, and December

21, 1935, but on motion of the plaintiff granted a temporary restraining order, February 1, 1937.

On February 23, 1937, this case came before this Court at Rock Hill, South Carolina, for hearing on its merits.

IV.

The plaintiff, Duke Power Company, is a corporation organized under the laws of the State of New Jersey. It is engaged in the business, among other things, of generating, transmitting, selling and distributing electric power and energy within the States of North and (797) South Carolina. It is engaged in such business in the counties of Greenwood, Newberry and Laurens, South Carolina. During the pendency of this litigation the Southern Public Utilities Company was absorbed by the Duke Power Company. This was accomplished in accordance with the law of South Carolina and with the permission of the South Carolina regulatories bodies. For that reason we have referred to the Duke Power Company as the "plaintiff" throughout our trial of the case.

V.

The defendant, Harold L. Ickes (hereinafter sometimes called the "Administrator"), is the duly c and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called "P. W. A."), appointed by Executive Order of the President of the United States, dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title II of the National Industrial Recovery Act, approved June 16, 1933.

VI.

Greenwood County, a political subdivision of South Carolina, having full constitutional and statutory authority to build and operate a hydro-electric plant at Buzzard Roost on the Saluda River (XXXVIII S. C. Stat. 411, 1392; *Park* vs. *Greenwood County*, 174 S. C.

35, 176 S. E. 870), estimated the cost of the construction of generating and transmission facilities at approximately $2,800,000.00, and applied to the Public Works Administration in November, 1933, for a loan and grant in that sum.

Without consulting with the P. W. A. the county prepared and included in its application a schedule of rates for the sale of electrical energy to various classes of customers. After the execution of the new contract of November 30, 1935, these rates were re-adopted by the County (Defendants' Exhibit 88), and have never been (798) changed since the time of their original inclusion in the application.

VII.

After full consideration by the Administrator an allotment was made for this project by the Administrator on June 19, 1934, and approved by the President on the following day. (Plaintiff's Exhibit 38.)

At the request of the Duke Power Company which was given a hearing on July 2, 1934, by the Public Works Administration in opposition to the allotment, the allotment was held in abeyance until November 7, 1934, when it was reaffirmed by the Administrator and the President. (Plaintiff's Exhibit 28.)

A contract was made between the Administrator and the County on December 8, 1934, which contract was later superseded by a new agreement (Defendants' Exhibit 80), on November 30, 1935, which is the only agreement now in effect. Under the provisions of this agreement the Administrator of Public Works agreed to make a grant to the County for the development of this project of thirty per cent of the cost of the labor and materials employed upon the project, not to exceed the sum of $682,000.00. The Administrator further agreed to buy such portion of the revenue bonds issued, $2,219,000.00 of 4% serial bonds, as is not sold to outside sources.

This contract provides that the funds raised from the grant and the sale of the bonds are to be used in the construction of a hydro-electric plant and a transmission system by Greenwood County.

VIII.

Under the existing contract dated November 30th, 1935, and still in force, the defendant, Ickes, has not reserved in express words any right or power to influence or control the rates to be charged by the proposed County plant (Paragraph 12, Defendants' Exhibit 80). Neither the United States nor the defendant Ickes has any power to control the operation of the project after construction is completed. The rights of the United States with respect to the construction of the project are fully set (799) forth in the contract of November 30, 1935 (Defendants Ex. 80.) The applicable provisions of the contract are found in paragraphs twelve and thirteen:

"12. The Administrator and the Government shall have no right or power of any kind with respect to the rates to be fixed or charged for the services and facilities afforded by the project, excepting only such rights as they may have as a holder of such bonds under the laws and the Constitution of South Carolina, and the lawful proceedings of the applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

"13. This Agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said project."

At the head of the P. W. A. is the Administrator, whose powers are plenary and subject only to the control of the President. He has complete supervision and direction of the Public Works Administration. The Public Works Administration is composed of a number of divisions, among which are the Legal Division, the Engineering Division, the Financial Division, and the Power Division. The first three of the foregoing are examining divisions, and their function is to examine and make recommendations to the Administrator with respect to applications for projects generally. The Power Division was organized August 1, 1935, and its function is

to examine and make recommendations to the Administrator with respect to the applications for electric and gas projects. In addition there existed at one time in the Public Works Administration an Electric Power Board of Review established May 9, 1934, which reviewed and considered protests with respect to electric power projects. The Electric Power Board of Review was dissolved by order of the Administrator on March 16, 1935.

X.

The State Engineers or Directors, each of the examining division of the P. W. A., the Power Division. (800) and the Electric Power Board of Review, have at all times had only advisory powers with respect to the approval of applications for loans and grants. None of these agencies had any power either by original authorization or subsequent ratification to make allotments or contracts or to make commitments with respect thereto, or to do anything whatsoever except to obtain information and to make advisory reports and recommendations to the Administrator. The power of approval or disapproval rested entirely with the Administrator and the President.

XI.

The application submitted by Greenwood County was handled in accordance with the procedure outlined in Findings 9, 10 and 14.

XII.

The determination to engage in the electric generating and distribution business was made by the properly constituted authorities of Greenwood County of their own free will. There was no solicitation or coercion on the part of the defendant, Ickes, his agents or subordinates. Any effect that the construction of the proposed County plant may have on plaintiff's rates or business will be the result of (1) the voluntary construction of an electric project by the County, and (2) *the voluntary decision of the County to use that plant in competition with plaintiff.*

XIII.

Manifestly it was the inauguration of the general plan of federal aid to municipal projects which put the idea in the minds of the Greenwood County authorities. While technically the Greenwood County authorities initially made the application they would never have had any shadow of a hope of financing such a project had it not been for the aid which was rendered by the federal government under the terms of the applicable statute. To contend otherwise is simply foolish in the face of the facts.

XIV.

(801) Upon his determination to approve a project, include it in the comprehensive program of public works, and make a loan and grant therefor, the Administrator submitted it to the President for his approval. When the action of the Administrator was approved by the President, funds were allocated for the specific project. (Plaintiff's Exhibit 38.) On March 20, 1934, pursuant to a Resolution (Senate Resolution 190, 73rd Congress) calling upon the Administrator to furnish the Senate with information including "A general survey of the public works program," an account of the organization of the Public Works Administration and a statement of its policies, the Administrator submitted a report to Congress, a document (Defendants' Exhibit 70), some three hundred pages in length, giving the information called for by the Resolution, including a detailed list containing the name, location and type of each approved project and the amount of funds allocated therefor.

Subsequent thereto the Administrator made supplemental reports to Congress (Defendants' Exhibits 71, 72 and 73), showing the allotments on non-Federal PWA projects, including in Exhibit 72 express reference to gas and electric projects.

Thereafter, on June 19, 1934, Congress enacted the Emergency Appropriation Act, fiscal year of 1935 (Public Act No. 412, 73rd Congress, 2nd session) which, among other things authorizing not exceeding $500,000,000.00 for public works under Title II of the National Industrial Recovery Act. On April 8, 1935, Congress enacted the Emergency Relief Appropriation Act of 1935, which, among other things, authorized the continuance of the Public Works Administration and the performance of

its functions, and made available additional sums for loans and grants to States, municipalities and other public bodies.

On June 22, 1936, by the First Deficiency Appropriation Act (Public Act No. 739, 74th Congress) Congress provided:

(802) "For useful public works projects of the kind and character for which the Federal Emergency Administrator of Public Works (hereinafter called the Administrator) has heretofore made loans or grants pursuant to title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, the Administrator may, upon the direction of the President, use not to exceed $300,000,000.00 from funds on hand or to be received from the sale of securities, for the making of grants, to aid in the financing of such projects: Provided, That no part of the sum made available by this paragraph shall be granted for any project unless, in the determination of the Administrator, the completion thereof can be substantially accomplished prior to July 1, 1938, and adequate provision has been made or is assured for financing such part of the entire cost thereof as is not to be supplied through the Federal Emergency Administration of Public Works; Provided, further, That this limitation upon time shall not apply to any project enjoined in any Federal or State Court: Provided further, That is no case shall the amount of the grant exceed 45 per centum of the cost of the project. * * * *

XV.

9,389 non-Federal projects of many different types and extending into every county of the United States except three, have been approved by the PWA and funds allocated therefor, and funds aggregating $1,480,612,543.00 have been allocated therefor. Of this number 282 are electric power projects, 92 of which are located in places where privately owned electrical facilities are now operated. These 92 allocations total $27,339,947.00 representing less than one per cent of the total number of allotments, and 98/100 of one per cent of the total amount of allotments. In addition thereto $54,000,025.00

have been allotted for several large water projects, which include power generating facilities along with other features, such as irrigation, flood control and navigation.

XVI.

I find from the evidence before me that in all probability the revenue from this project will be ample to reasonably secure the revenue bonds preposed to be issued, and sufficient to provide for the maintenance and operation of the plant and for the payment of interest and the principal of the loan in accordance with Section (803) 21 of the South Carolina Revenue Bond Act of 1933 and the retirement schedule set out in the contract of November 30, 1935, (Defendants' Exhibit 80).

I find that the project will be self-liquidating and that if the Government advances the money on the bonds, such a loan will be reasonably secured.

XVII.

Congress, desiring to relieve the country from the severe economic depression, enacted Title II of the National Industrial Recovery Act for the purpose of increasing employment quickly. (Section 203.) The means employed by Congress for this purpose as set out in that

NOTE: §21. Rates for Service.—Rates for services furnished by any such system or combined system shall be fixed precedent to the issuance of the bonds. Such rates shall be sufficient to provide for the payment of the interest upon and the principal of all such bonds as and when the same become due and payable to create a Bond and Interest Redemption Fund therefor, to provide for the payment of the expenses of administration and operation and such expenses for maintenance of the system or combined system necessary to preserve the same in good repair and working order, to build up a reserve for depreciation of the existing system, project or combined system, and to build up a reserve for improvements, betterments and extensions to the existing system, project or combined system other than those necessary to maintain the same in good repair and working order as hereinbefore in this Section provided. Such rates shall be fixed and revised from time to time so as to produce these amounts, and the governing body shall covenant and agree in the ordinance authorizing the issuance of such bonds, and on the face of each bond at all times to maintain such rates for services furnished by such system, project or combined system as shall be sufficient to provide for the foregoing.

section and other sections, was through a program of public works, a portion of which was to be carried out by the National Government itself, and a portion to be carried out by the States of the Union and their subdivisions, aided by loans and grants from the Government of the United States.

I find that Congress' purpose of increasing employment is a proper national purpose and the expenditure of moneys for this purpose is authorized under the provisions of the United States Constitution.

I further find that the means used by Congress for relieving unemployment in so far as they affect this case, that is, the aiding of States and their subdivisions in the construction and financing of public works, are proper means of carrying out this national purpose of relieving unemployment.

XVIII.

I find that the defendant, Harold L. Ickes, Federal Emergency Administrator of Public Works, in making this allotment of funds to Greenwood County and in entering into the contract with the county, had no purpose other than that set out in the Act of Congress and that the policy of the Public Works Administration is cor-
(804) rectly set out in the Administrator's report to the United States Senate (73rd Congress, 2nd session, Senate Document 167; Defendants' Exhibit 70):

"The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works, thereby increasing the consumption of goods and also providing employment in the capital goods industry."

IX.

In view of the fact that the proposed loan to Greenwood County was to be evidenced by revenue bonds, it was necessary for the Public Works Administration, in order to carry out Congress' mandate that the loan should be reasonably secured (48 Stat., 203), to examine into the rates of the plaintiff who operated in the territory in which the Greenwood project would be developed. It

was necessary that the Administrator be satisfied that the County's proposed rates were low enough to obtain customers and high enough to yield a revenue sufficient to liquidate the bonds.

XX.

The rates charged by the Greenwood County project could not be a yardstock for rates charged by electrical utilities in South Carolina. From the evidence before me, and from the contract of November 30, 1935, between the Administrator and Greenwood County, it is apparent that there could be no logical comparison of construction costs between the Greenwood County project and any private utility project, as the contract contains numerous provisions as to labor and material to be used in the construction of the Greenwood County plant that would make its construction costs higher than the construction costs of a private utility plant not subject to the same contract provisions. A comparison of rates would not be practical in that a municipal plant is usually, though not necessarily, free of taxation, whereas (805) the overhead cost per kilowatt hour of a large utility, such as that of the Duke Power Company, would be substantially less than the overhead on the small plant proposed by Greenwood County. If Greenwood's project is, therefore, developed it would not operate as a yardstick by which private utility rates might be measured.

XXI.

The testimony shows that at the most the Greenwood County plant will produce about 25,000,000 K. W. H. Of this amount the County has tentative plans to sell about 12,000,000 K. W. H. to parties who are now customers of Duke Power Company. Duke Power Company, in the Piedmont Section of the Carolinas in 1936 sold 2,476,000,000 K. W. H. The increase over their 1935 sales was over 380,000,000 K. W. H. Thus the loss of 12,000,000 K. W. H. to Greenwood County will amount to only about 3% of the annual increase of the Duke Power Company. From a practical standpoint, it is inconceivable that this small competition would result, un-

der all of the evidence in this case, in a forced reduction throughout the entire Duke system.

In any event, the Duke Company in appearing before the South Carolina regulatory body with respect to its rates could show these pertinent facts in a very definite manner. We do not conclude that the competition of the Greenwood County plant would necessarily force the Duke Company to lower its rates throughout the system.

XXII.

The South Carolina Constitution of 1895, now in force in this State, provides by Article 9, Section 14, for a State Railroad Commission. This Commission is vested with the following duties and powers:

"§14. The Railroad Commission.—A Commission is hereby established to be known as 'the Railroad Commission,' which shall be composed of no less than three members, whose powers over all transporting and transmitting corporations, and duties, manner of election and (806) term of office shall be regulated by law; and until otherwise provided by law the said Commissioners shall have the same powers and jurisdiction, perform the same duties and receive the same compensation as now conferred, prescribed and allowed by law to the existing Railroad Commissioners: * * *"

At all times since 1895 there has been some regulatory body exercising power and authority under this provision of the Constitution. The names and personnel of the Commission have been changed from time to time but there has never been any substantial difference in their powers and duties. Control over electric and gas rates has at all times been an active question before the South Carolina regulatory bodies. There have been numerous hearings, orders, court proceedings, and many voluntary reductions in rates. All of these are matters of public record in South Carolina.

J. LYLES GLENN,
United States District Judge.

Rock Hill, South Carolina,
June 1st, 1937.

(808) CONCLUSIONS OF LAW.

1.

The applicable provisions of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, and the contract and the loan and grant involved in this suit are valid and constitutional.

2.

The applicable provisions of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, and the contract and the loan and grant involved in this suit involve valid expenditures for the general welfare, and involve no improper delegation of legislative power and no exercise of any improperly delegated power, and do not violate the Tenth Amendment or any other provisions of the Constitution.

3.

Title II of the National Industrial Recovery Act sets forth definite standards with respect to the purposes of the expenditures by the Administrator and the means by which such expenditures should be made. These standards, as administratively interpreted, were reaffirmed by the Emergency Relief Act, Fiscal Year of 1935, approved June 19, 1934, and were also reaffirmed by and incorporated in Section 12 of the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and by the First Deficiency Appropriation Act of 1936, approved June 22, 1936.

4.

If the making of the loan and grant results in lower rates, such result is but the incidental effect of what the States and their municipalities voluntarily decide to do, and therefore cannot have the effect of making such loan and grant invalid.

5.

The plaintiff, Duke Power Company, has brought a Bill in Equity seeking injunctive relief. The Bill simply asks for an injunction against Greenwood County, a South Carolina municipal corporation, and the personnel of the Finance Board of Greenwood County, created (809) under an Act of the South Carolina Legislature, and finally against Harold L. Ickes, as Federal Emergency Administrator of Public Works. The theory of the suit is that the Defendants jointly are about to make illegal use of Federal funds to the damage of the plaintiff. There is nothing novel or mysterious about this type of suit. It is neither a suit against the United States nor against the State of South Carolina. It is simply a suit where injunction is sought against State and Federal officers to prevent them from invading the Constitutional and other legal rights of the plaintiff.

6.

This Court is of the opinion that the rights sought to be protected involve both the asserted right to be free from damaging competition and the absolute right to have local transactions regulated by State authorities. Several of the Courts dealing with suits of this type have drawn no distinction between these two rights. This Court is of the opinion that there is a clear distinction between them. The Opinion filed herewith points out the Court's views at greater length.

7.

Lawful competition, even though financed by the Federal Government, does not in itself give rise to a cause of action, it is "*damnum absque iniuria*"—See five cases dealing with identical proposition involved here—page 12 of the Opinion.

8.

The fact that the plaintiff may not, however, be entitled to injunctive relief on the competitive theory alone does not prevent it from asserting its *absolute* right,

guaranteed by the Federal Constitution to have its local transactions regulated by State authority, if regulated at all. In short, the question here is not the effect of the regulation but the authority, whether State or National, which carries on the regulation. Beneficial National regulation would be illegal, if substantial. Harmful State regulation might be perfectly legal, unless it went to the extent of being arbitrary and unreasonable.

9.

Federal regulation which substantially supplants (819) and displaces State regulation, either directly or indirectly, would be in violation of the plaintiff's Constitutional rights.

10.

If Congress, in the exercise of a constitutional right, passed a law, the existence of an incidental motive or purpose which would not alone have justified the exercise of Congress' power will not serve to invalidate the law.

Arizona vs. *California*, 283 U. S., 423, 456.
Hampton vs. *U. S.*, 276 U. S., 394.
U. S. vs. *Doremus*, 249 U. S., 85.

11.

There is no doubt in the mind of this Court that, at the very beginning, the policy of the Administrator was to exercise rather a large authority over the operation of the Greenwood County plant. There has been, however, a complete change of the actual legal intention with respect to this control. Under the present contract, Greenwood County and its Finance Board are subject to, in the operation and management of the plant, regulatory bodies of South Carolina. The only limitation on this freedom of South Carolina is that control which the Administrator will find necessary to protect his interests as a holder of the bonds. This interest is comparable to that which the owner of a County bond has to require, by way of receivership or mandamus, that taxes be assessed, collected and applied to the payment of the bonds.

12.

The contract and the proposed loan and grant involved in this suit are made and being made in full compliance with the applicable statutes.

13.

The administrative interpretation of the provisions of Title II of the National Industrial Recovery Act with reference to the preparation of a comprehensive program of public works, as set forth in Finding of Fact No. 14, and in the inclusion of projects therein was a reasonable, practical and proper interpretation. Moreover, (811) that interpretation has been adopted, ratified and approved by the Congress by the subsequent statutes above referred to.

14.

The acts of the President and the Administrator in this case were not unreasonable and were within the range of sound discretion.

The acts of the President and the Administrator in approving and making the contract and the loan and grant called for the exercise of administrative discretion not subject to judicial review unless arbitrary and unreasonable.

15.

Greenwood County has full authority under the Constitution and laws of South Carolina to build and operate the proposed hydro-electric generating and transmission system.

XXXVIII S. C. Stat., 411, as amended.

Park vs. *Greenwood County*, 174 S. C., 35, 176 S. E., 870.

16.

The revenue bonds proposed to be issued by Greenwood County do not constitute debts within the meaning

of the South Carolina Constitution of 1895 (Art. X, Secs. 5 and 6; Art. VIII, Sec. 7), and will be valid under the Constitution and laws of South Carolina.

Park vs. *Greenwood County,* 174 S. C., 55, 176 S. E., 870.

Cathcart vs. *City of Columbia,* 170 S. C., 362, 170 S. E., 435.

17.

Greenwood County, by building its proposed hydro-electric plant and by simply competing with the plaintiff, will not infringe any legal right of the plaintiff for it is thoroughly settled that competition of a County or municipality violates no right of a public service corporation doing business therein when, as in the case of the plaintiff here, the corporation has no exclusive franchise.

Puget Sound Power & Lt. Co. vs. *Seattle,* 291 U. S., 619.

Madera Waterworks vs. *Madera,* 228 U. S., 454.

Greenwood County vs. *Duke Power Co.,* 81 F. (2d), 986.

(812) The fact that the South Carolina Legislature authorized and enabled the Greenwood County Finance Board to take advantage of the offers and financial aid made by the Federal Government through a Federal Statute does not in itself amount to coercion by the Federal Government.

It is true that, if the conditions of the benefits amount to substantial control by the Federal Government, then the device of offered aid and acceptance would not be allowed to accomplish an unconstitutional result. But, as we have set forth in the Opinion, there is nothing inherently wrong with the Federal Government aiding a State Government, provided no Constitutional provision is violated. The application of this principle of law in this case is, we think, in accord with the Opinion of the Supreme Court in *Carmichael* vs. *Southern Coal & Coke Company*—Opinion delivered May 24, 1937—wherein the Social Security Act was being attacked as being unconstitutional on the ground of coercion. At page 17, the Opinion says:

"The United States and the State of Alabama are not alien governments. They coexist within the same territory. Unemployment within it is their common concern. Together the two statutes now before us embody a cooperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation * * *."

"* * * And, for the reasons stated in the opinion in the Chas. G. Steward Machine Co. case, we conclude that the deposit by the state of its compensation fund in the Unemployment Trust Fund involves no more of a surrender of sovereignty than does the choice of any other depository for state funds. The power to contract and the the power to select appropriate agencies and instrumentalities for the execution of state policy are attributes of state sovereignty. They are not lost by their exercise * * *."

(813) It is impossible to decide this case without considering the sovereignty involved. Sovereignty in the consideration of this case is more than an abstract conception. When viewed in the light of the American Constitution and American Constitutional history, it is a term explained by actualities rather than theories. Sovereignty has been so much discussed in our National history that it has come to be a term of political philosophy, having a tangible rather than an intangible meaning. Sovereignty is inherent in the States. Sovereignty for certain purposes has been delegated to the Nation. The people themselves are the original depositories of sovereignty under our American system of Government.

Regulation of industry of any kind, local in nature, is the proper activity of the State sovereignty and will not be held to be national, unless specially authorized by the Constitution.

That this conception of sovereignty is neither remote nor impractical is seen when we consider the many times that the Supreme Court of the United States has rendered its decisions in terms of the Sovereignty involved. For example:

"SOVEREIGN PEOPLE.

The words 'sovereign people' are familiarly used to describe the political body, who, according to our republican institutions, form the sovereign, and who hold the power and conduct the government through their representatives. Every citizen is one of these people and a constituent member of this sovereignty. *Scott* vs. *Sandford,* 60 U. S. (19 How.) 393, 404, 15 L. Ed. 691."

20.

FUNCTION OF THE COURT.

It is well to state our conception of the function of Court in ruling upon an important Constitutional case involving the relations between the States and the Nation. This duty is nowhere better described than in the case of the *United States* vs. *Butler,* 297 U. S. at page 62.

"There should be no misunderstanding as to the function of this Court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the peoples representatives. This is a misconception. The Constitution is the supreme law of (814) the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the Courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends."

(815) We conclude finally:

(a) That the plaintiff is not entitled to the injunction prayed for in the Bill of Complaint, or any other Equitable relief in this action.

(b) That the Statutes involved, as applied in this action, are not unconstitutional.

(c) That although the result, direct and inevitable, of the building of the plant contemplated by Greenwood County will be to compete with the Duke Power Company, Plaintiff, and, although this competition will render substantial injury, that, so far as the competition itself is concerned, it does not amount to an invasion of the Plaintiff's rights and such injury is, therefore, "*damnum absque iniuria*" in the eyes of the Law.

(d) That this holding does not deprive the plaintiff of its rights to have its other asserted rights tested on their legal and factual merits; it does not entitle the Defendants to a dismissal of the Bill for this reason and this reason alone.

(e) That the Plaintiff has an absolute right to have the balance between the State and Federal Regulatory Authority preserved as it exists under the Constitution; that if this balance is disturbed in a substantial way, the plaintiff would be entitled to relief.

(f) That the Plaintiff has failed to show by the greater weight of the evidence that he is entitled to this relief, this decision being on the weight of the evidence and not denying in any way the existence of the legal right.

The legal right here is that of "*iniuria sine damno*", the classical illustration of this right being *Ashby* vs. *White*, 1 Smith's Leading Cases 251.

(g) That the other grounds on which the plaintiff seeks to have the action of the Administrator of Public Works and the Finance Board of Greenwood County enjoined are without merit.

(816) (h) That on the phases of the case, which are not discussed separately and dealt with in these Conslusions of Law or in the Opinion filed herewith, this Court adopts as its Opinion on the Law the decision of the Circuit Court of Appeals for the Fourth Corcuit in the case of *Greenwood County* vs. *Duke Power Co.*, 81 Fed. (2d) 986, being the instant case on the first appeal.

(Signed) J. LYLES GLENN,
United States District Judge.

Rock Hill, South Carolina,
June 1st, 1937.

(817)

United States District Court
West. Dist. of So. Car.
JUN 2 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

(818) **FINAL DECREE DISMISSING BILL AND DENYING INJUNCTION.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company, a Corporation Organized and Existing Under the Laws of the State of New Jersey, Complainant,

versus

Greenwood County, and E. L. Brooks, S. A. Agnew and E. I. Davis, Members of and Constituting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

} In Equity.

This cause came on to be heard on its merits at the February Term of the Equity Court at Rock Hill, South Carolina. Testimony was taken and exhibits were offered and the case was argued by counsel.

The Court has filed its Opinion, which sets forth fully

the previous history of the case. The terms of Equity Rule 70-1/2 have been complied with and separate Findings of Fact and Conclusions of Law have been made and are filed herewith. A special situation with respect to the costs is outlined on the attached sheet, which is hereby made a part of this Decree. And, now thereupon, and upon consideration of the entire case, it is

ORDERED, ADJUDGED AND DECREED as follows, viz:

1. That the plaintiff be, and it is hereby denied any temporary or permanent injunctive relief of any kind, nature or description.

2. That all previous interlocutory injunctions and temporary restraining orders heretofore issued be, and the same are, hereby vacated and set aside.

3. That the plaintiffs' bill herein be, and the same is, hereby dismissed on the merits.

4. For the reasons stated on the attached sheet, it is hereby ORDERED, ADJUDGED AND DECREED that the costs be taxed one-half against the plaintiff, Duke Power Company, and one-half jointly against the defendants.

(Signed) J. LYLES GLENN,
United States District Judge.

Rock Hill, South Carolina,
June 1st, 1937.

(819) SPECIAL SITUATION WITH RESPECT TO COSTS.

Reference has been made throughout the Opinion and Findings of Fact and Conclusions of Law to the case of *Park* vs. *Greenwood County,* 174 S. C. 35, 176 S. E. 870. The record shows that in early October, 1934, the plaintiffs, Duke Power Company and Southern Public Utilities, now consolidated under the Duke Power Company, filed a petition for intervention in that suit. The scope of that petition suggests that it would have

raised all of the issues which are present in the instant litigation. This petition for intervention was resisted by the defendants and the intervention denied. By not being allowed to participate in that suit as a party, necessity resulted for this suit. This suit has had a long and expensive course. The presumption is that the South Carolina Supreme Court would have followed the proper methods of procedure, and with direct appeal to the Supreme Court of the United States, a much earlier and less expensive decision of the important questions involved here could have been had. It seems to this Court, therefore, that much of the delay may be traceable to the resistance on the part of the defendants here to the plaintiff's petition for intervention in that suit, brought in the original jurisdiction of the Supreme Court of South Carolina. Therefore, in fixing the costs, we feel that we are acting wisely in taxing at least half of the costs against the defendants jointly—it being immaterial to this Court as to the contribution as between the defendants themselves.

(820)

United States District Court
West. Dist. of So. Car.
JUN 18 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

ASSIGNMENT OF ERRORS.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,
vs.
Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, Members of and Constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Administrator of Public Works, Defendants.
} In Equity.

Duke Power Company and Southern Utilities Company, Plaintiffs in the above entitled action, file the fol-

lowing assignments of error upon which they will rely on their appeal, herewith applied for, from the decree of this Honorable Court entered in this cause on June 2, 1937:

I.

The Court erred in overruling plaintiffs' motion that the retrial of the cause be restricted to the issues raised by the supplemental pleadings filed pursuant to the mandate of the Supreme Court and relating to facts alleged to have supervened since the entry of the original decree of injunction in the cause, and in holding that de-
(821) fendants, under the mandate of the Supreme Court, were entitled to a rehearing of the original issues.

Mr. ROBINSON, Counsel for Plaintiffs: It is our position that the defendants here asked for the remand of this case on their motion, alleging that there had been a change in fact since the taking of the previous testimony and since the findings of the court, and it was upon that allegation of a supervening change that the case was sent back. The matter now before Your Honor is the question of the alleged supervening change in the facts since the decree, and the evidence now to be presented should relate to this subsequent change and not to the original issues.

The COURT: As I read the Supreme Court's decision it seems to contemplate that the case should be tried practically as a new case. Of course, there are some legal questions that will come up during the trial that I will have to rule on and on which I have an open mind and I want to hear arguments on both side of them.

Mr. ROBINSON: Of course, I don't want to discuss any matter about which Your Honor has a firm opinion.

The COURT: I am rather firm in the view Mr. Robinson that we ought to proceed to try the case in the normal way.

Mr. ROBINSON: In order to present the question plaintiffs desire to file the following motion:

"Plaintiffs move the Court to hold and rule:

1. That the mandate of the Supreme Court does not

require a rehearing of the issues raised by the original pleadings which were tried and determined by this Court prior to the entry of the original decree of injunction of August 26, 1935, or a review of the findings of this Court on said issues, except to the extent that this (822) Court should find that said original findings have been displaced or otherwise materially affected by facts which may have supervened since the entry of said original decree of injunction.

2. That the retrial of the cause be restricted to the issues raised by the supplemental pleadings filed by the parties since the receipt of the mandate of the Supreme Court and pursuant to said mandate, which issues relate to the alleged supervening facts since the entry of said original decree of injunction.

Respectfully submitted,

H. J. HAYNSWORTH,
R. T. JACKSON,
W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs."

The COURT: You may hand it up to me. The motion will be denied.

Mr. ROBINSON: Plaintiffs would like to take an exception.

The COURT: Objection and exception taken and allowed.

Mr. ROBINSON: Now if Your Honor please may I make this further statement that the plaintiffs in introducing their testimony do so subject to the position which they have taken in the motion. I do that because it is the position of the plaintiffs that no evidence bearing upon the original issues and which might have been introduced on the original hearing is now admissible, and of course by proceeding first as Your Honor has suggested we may appear to be waiving that position.

The COURT: I understand that you are not.

Mr. ROBINSON: Because in order to comply with (823) Your Honor's ruling we must put on any additional evidence which we have on the original issues.

The COURT: That is right.

II.

The Court erred in its conclusions of Law Nos. 1, 2, and 20 (b), holding that—

"The applicable provisions of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, and the contract and the loan and grant involved in this suit, are valid and constitutional"; that they "involve valid expenditures for the general welfare, and involve no improper delegation of legislative power and no exercise of any improper delegated power, and do not violate the Tenth Amendment or any other provisions of the Constitution."

In so holding the Court erred for that:

(a) Title II of the National Industrial Recovery Act (48 Stat. 200, *et seq.*), as applied to this case and as construed by the Court to authorize the grant and so-called loan of federal funds for the construction of the proposed local electric power plant, the contract involved herein and the action of the Administrator of Public Works, is not within any power delegated to Congress by the general welfare clause, U. S. Const., Art. I, Sec. 8, Cl. 1, or by any other clause or provision of the U. S. Constitution; and is violative of the Tenth Amendment to said Constitution, in that it invades powers and governs and controls matters reserved to the States.

(b) The statute, as so construed and applied, is not a lawful exercise of the power of Congress to expend public funds for the general welfare of the United States; and is not an appropriate and constitutional (824) means to which Congress may resort for the relief of unemployment.

(c) It deprives plaintiffs of their property without due process of law, in violation of the Fifth Amendment to the U. S. Constitution.

(d) It unlawfully delegates legislative power to the

Executive Department of the Government, in violation of Art. I, Sec. 1, of the U. S. Constitution, and of the other provisions of said Constitution which prohibit the delegation of legislative power to the Executive Department.

(e) The loan and grant and the contract involved herein were made under the asserted authority of Title II of the National Industrial Recovery Act. The Emergency Relief Appropriation Act of 1935 has no application to the case; it has not been set up or relied on by any of the parties to this suit in any of the proceedings herein; and, if applicable, is unconstitutional on the grounds above set forth in respect of the application of Title II of the National Industrial Recovery Act.

III.

The Court erred in its Conclusion of Law No. 3, holding that—

"Title II of the National Industrial Recovery Act sets forth definite standards with respect to the purposes of the expenditures by the Administrator and the means by which such expenditures should be made. These standards, as administratively interpreted, were reaffirmed by the Emergency Relief Act, Fiscal Year of 1935, approved June 19, 1934, and were also reaffirmed by and incorporated in Section 12 of the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and by the First Deficiency Appropriation Act of 1936, approved June 22, 1936."

(825) IV.

The Court erred in its Conclusion of Law No. 4 holding that—

"If the making of the loan and grant results in lower rates, such result is but the incidental effect of what the States and their municipalities voluntarily decide to do, and therefore cannot have the effect of making such loan and grant invalid;" the error being that:

The lowering of rates will not be the incidental effect of what the State of South Carolina and Greenwood County have voluntarily decided to do; but will be the direct result and the natural and inevitable effect of the making of said loan and grant.

V.

The Court erred in its conclusions of Law Nos. 6, 7 and 8, the error being that the plaintiffs' right to injunctive relief does not rest solely upon federal regulation of matters of intrastate concern, but also upon the right of any citizen whose property is proximately damaged by one purporting to act as an officer of the federal government to challenge the constitutional or other authority for the action of the federal officer or agent, and that the competition threatened in this case would not be lawful.

VI.

The Court erred in its Conclusion of Law No. 11 holding that, although originally it was the policy of the Administrator to exercise rather a large authority over the operation of the Greenwood County plant, yet there has been a complete change of the actual intent with respect to this control; that under the present contract Greenwood County and its governing authorities, in the operation and management of said plant, are subject to the regulatory bodies of South Carolina; and that the (826) only limitation on this freedom of South Carolina is that control which the Administrator will find necessary to protect his interest as a holder of the bonds, this interest being comparable to that which the owner of a County bond has to require, by way of receivership or mandamus, that taxes be assessed, collected and applied to the payment of the bonds; the error being that:

(a) The natural and inevitable effect of the making of said loan and grant for the construction of said proposed plant will be to lower intrastate electric power rates, and to carry out the policy of the Public Works Administration directed to that end; and the changes by the substitution of the present contract for the prior contract of December 8, 1934, are immaterial, leaving

the loan and grant and the proposed plant the same, as they originally were, in character, purpose and effect.

(b) The applicable Statute of the State of South Carolina expressly provides that the rates to be charged by said plant "shall not be subject to supervision or regulation by any State bureau, board, commission or other like instrumentality or agency" of the State.

(c) The said bonds will be payable solely from the revenues of the plant, and in order to get and hold the business necessary to pay the installments of principal and interest on said bonds it will be necessary for said plant to maintain rates substantially below the rates of plaintiffs.

VII.

The Court erred in its Conclusion of Law No. 12 holding that—

"The contract and the proposed loan and grant involved in this suit are made and being made in full compliance with the applicable statutes;" the error being that:

(827) (a) The provisions of Secs. 202 and 203 of Title II of the National Industrial Recovery Act, requiring the preparation of a comprehensive program of public works, have not been complied with.

(b) The so-called loan to Greenwood County is not reasonably secured as required by Sec. 203 of Title II of said Act.

(c) The proposed plant will not be a useful public work, but will be a wasteful duplication of the facilities of plaintiffs.

(d) The controlling factor in the making of said loan and grant by the Public Works Administration was the effect which it will have in reducing intrastate electric power rates and in the promotion of public ownership.

VIII.

The Court erred in its Conclusion of Law No. 13 holding that the administrative interpretation of the provisions of Title II of the National Industrial Recovery Act with reference to the preparation of a comprehensive program of public works under which interpretation individual projects were, from time to time, selected to be financed with federal funds, was a reasonable, practical and proper interpretation of said provisions, and that said interpretation had been adopted, ratified and approved by Congress.

IX.

The Court erred in its Conclusion of Law No. 14 holding that the acts in this case of the executive and administrative officials of the Public Works Administration were not unreasonable and were within the range of sound discretion and further erred in that thus to limit judicial review deprives the plaintiffs of the privilege of the full and judicial scrutiny of the facts, jurisdictional and otherwise, guaranteed by the due process clause of the Fifth Amendment and by Art. III, Secs. 1 and 2, of the Constitution.

(828)

X.

The Court erred in holding that the damage which plaintiffs will sustain in this case will result solely from lawful competition by Greenwood County, and that no legal right of plaintiffs will be invaded by the threatened acts of the defendants herein.

XI.

The Court erred in finding holding that plaintiffs will sustain no substantial injury in this case from the unlawful use of federal funds by the defendants herein in financing the construction of said plant.

XII.

The Court erred in holding that plaintiffs are not

entitled to the injunction prayed for or to any other relief in this action, and in dismissing the bill of complaint.

XIII.

The Court erred in its Finding of Fact No. X; the error being that the agents and representatives of P. W. A. handling applications for loans and grants for the construction of publicly owned power plants, competitive with private utilities, were authorized to negotiate and, with the knowledge and approval of the Administrator did negotiate, with private utilities for reductions in rates, giving them the opportunity to escape federally subsidized competition by reducing their rates to a level satisfactory to the PWA authorities.

(829) XIV.

The Court erred in making its Finding of Fact No. XI; the error being that the Greenwood County application was not handled in accordance with the procedure referred to in said finding, but said application was approved and the loan and grant made because the PWA authorities considered the rates of plaintiffs excessive.

XV.

The Court erred in making its Finding of Fact No. XII, as follows:

"The determination to engage in the electric generating and distribution business was made by the properly constituted authorities of Greenwood County of their own free will. There was no solicitation or coercion on the part of the defendant Ickes, his agents or subordinates. Any effect that the construction of the proposed County plant may have on plaintiffs' rates or business will be the result of (1) the voluntary construction of an electric project by the County, and (2) in voluntary decision of the County to use that plant in competition with plaintiffs;" the error being that:

(830) (a) The effect that the construction of the proposed plant will have on plaintiffs' rates and business will not be the result of the voluntary construction of the

plant by the County and the voluntary decision by the County to use the plant in competition with the plaintiffs, but will be the direct result of the making of said loan and grant and of financing the construction of said plant with federal funds.

(b) Greenwood County's application was filed in response to WPA's solicitation of applications for loans and grants for the construction of publicly owned utilities whose rates would serve as yardsticks to control and lower power rates, the application stating that the rates to be charged by the proposed plant would be only slightly above the TVA rates in Tupelo, Miss., and that they would furnish a yardstick of the cost of hydro-electric power in the territory where the plant will operate.

XVI.

The Court erred in making its Finding of Fact No. XVI; the error being that the loan will not be reasonably secured nor the plant self-liquidating.

XVII.

The Court erred in its Finding of Fact No. XVII, in finding—

"that the means used by Congress for relieving unemployment in so far as they affect this case, that is, the aiding of States and their subdivisions in the construction and financing of public works, are proper means of carrying out this national purpose of relieving unemployment;" the error being that the loan and grant in this case was not make for the relief of unemployment and that the finding is in effect a conclusion of law and as such is erroneous.

(831) XVIII.

The Court erred in making its Finding of Fact No. XVIII; the error being that the allotment of federal funds to Greenwood County was made and the contract with the County entered into so as to lower power rates;

this was the controlling factor in the making of said allotment and will be the natural and inevitable effect of said allotment.

XIX.

The Court erred in making its Finding of Fact No. XIX; the error being that it was not necessary for the Public Works Administration to examine into the rates of plaintiffs in order to carry out Congress' mandate that the loan be reasonably secured; and the examination into plaintiffs' rates was not made for that purpose.

XX.

The Court erred in making its Finding of Fact No. XX; the error being that the rates charged by the Greenwood County project will serve as a yardstick for and means of regulating other power rates and plaintiffs will be forced to reduce their rates or else will sustain substantial injury to their business.

XXI.

The Court erred in making its Finding of Fact No. XXI; the error being that plaintiffs will be forced to reduce their rates; unless their rates are reduced, plaintiffs will sustain an immediate and certain loss in Greenwood, Newberry and Laurens Counties, South Carolina, of approximately $250,000 annually, and in addition will sustain further and larger losses certain to occur but uncertain as to amount.

(832) XXII.

The Court erred in failing and refusing to find that plaintiffs are adequately serving the territory in which the proposed plant would operate; that the established and available facilities of plaintiffs are amply sufficient adequately to serve said territory for many years; that plaintiffs' business and their rates for the sale and distribution of electric power in South Carolina are subject to the exclusive jurisdiction and control of the Public Service Commission of that State; and that their rates have been approved by said Commission.

XXIII.

The Court erred in failing and refusing to find that the proposed plant will be a purely local and intrastate enterprise, and that it will be an unnecessary and wasteful duplication of plaintiffs' facilities.

XXIV.

The Court erred in failing and refusing to find as follows:

"The Federal Emergency Administration of Public Works in determining whether to approve or to disapprove an application for a loan and grant of federal funds for the construction of a municipal power plant, such as the proposed Buzzard Roost plant, adopted and applied the criterion that no such application would be approved unless the rates of the proposed plant would be materially lower than the rates of the privately-owned utility with which the proposed plant would compete. Accordingly where the privately-owned utility agreed to (833) put in effect rates at least as low as the rates of the proposed municipal plant the application was not approved. This criterion was adopted and applied by the Federal Emergency Administration of Public Works pursuant to its announced power policy to bring about the reduction of electric power rates so as to make electric energy more widely available at cheaper rates. The effect of this policy was to constitute the rates of the proposed municipal plant a standard or yardstick by which to measure, regulate and control electric power rates and to bring about reductions in such rates."

XXV.

The Court erred in failing and refusing to find as follows:

"The application filed with the Federal Emergency Administration of Public Works on November 16, 1933, stated that the rates of the proposed Buzzard Roost plant were only slightly above the Tennessee Valley Authority rates which would be applied in Tupelo, Miss., and that

the proposed plant would establish, in the territory in which it would operate, an economic electric service similar to that set up by the Tennessee Valley Authority and would furnish a proper and fair yardstick and measure of the cost of hydro-electric power. On the application being filed the rates of plaintiffs, with which the proposed plant would compete, were investigated by the Federal Emergency Administration of Public Works, and the conclusion was reached that plaintiffs' rates were (834) excessive. The rates of the proposed plant, being materially lower than plaintiffs' rates, the application met the required test of the Public Works Administration, and was accordingly approved pursuant to the policy of said Administration to approve applications for such plants as would be effective in bringing reductions in power rates in the localities in which such plants would be operated."

XXVI.

The Court erred in failing and refusing to find as follows:

"The rates at which the proposed plant would sell electric power and energy being materially lower than the rates of plaintiffs, the County, because of said lower rates, has been able to enter into contracts for the sale of a large part of the electric power and energy which would be produced by the proposed plant to consumers of power who are now, and for a number of years have been, customers of the plaintiffs. If the project should be constructed and put into operation the plaintiffs will be deprived of their customers in the territory in which the project would operate, and the property and business of plaintiffs will be seriously and permanently injured."

XXVII.

The Court erred in failing and refusing to find as follows:

"The terms and conditions of the loan and grant, as approved by the Federal Emergency Administration of Public Works, were first set forth in detail in a con-

(835) tract which the County entered into with the Administrator of Public Works on December 8, 1934. This contract was superseded by a new contract dated November 30, 1935. This new contract made no change in the character, scope or purpose of the project, in the nature of the business in which it would engage, in the territory in which it would operate in the event of its construction or in the necessary and inevitable effect on plaintiffs' rates. The new contract was not based on any new application by the County to the Federal Emergency Administration of Public Works, but was entered into pursuant to the original application and to the resolutions of the Federal Emergency Administration of Public Works dated June 20, 1934, and November 7, 1934, approving said application. Under the new contract the same amount of federal funds would be advanced by the Administrator of Public Works by way of loan and grant, on terms and conditions whereby the County would make no investigation of its own funds for the construction of the project, and would incur no liability and assume no obligation either for its construction or for its operation."

XXVIII.

The Court erred in failing and refusing to find as follows:

"If said plant is constructed as proposed, the plaintiffs, in order to avoid the loss of their business and the consequent injury to their property, will be forced to (836) make material reductions in their rates so as to meet the competition of the lower rates of said plant; and the direct, necessary and inevitable effect of said loan and grant for the construction of said plant will be to regulate and control the intrastate electric rates of the plaintiffs, not only in the territory in which said plant would operate, but throughout the entire territory in which plaintiffs do business."

XXIX.

The Court erred in failing and refusing to find as follows:

"The proposed plant would not and could not be

constructed and operated at rates lower than those of plaintiffs except for said loan and grant of federal funds, and the injury to the business and property of the plaintiffs and the loss and damage which they would sustain would be directly caused and brought about by said loan and grant of federal funds."

XXX.

The Court erred in overruling objections by plaintiffs to the following line of questions put by counsel for defendants to the defendant, Harold L. Ickes, upon direct examination, and in admitting in evidence over the objection and exception of plaintiffs the testimony of said defendant in response to said questions, to-wit:

Q. Were your intentions and purposes under the former contract with Greenwood County—contract of December 8, 1934—in any way substantially different from what you have just indicated? (The witness having indicated that he had no interest in plaintiffs' rates except his interest as a holder of the special revenue (837) bonds of the County.) A. None at all.

Q. I call your attention to Senate Document 169, 73rd Congress, second session, or a copy of the same, being entitled "Letter from the Administrator of Public Works pursuant to Senate Document No. 190, A report of business of the Federal Emergency Administrator of Public Works for the period ending February 15, 1934". Such letter being dated March 22, 1934. And ask you to turn on page 9 of that report headed "Part III Policy of the Public Works Administration". The first sentence reads: "The fundamental purpose of the Public Works Administration is to relieve unemployment and increase purchasing power through the construction of useful public works, thereby increasing the production of goods and also providing employment in the capital goods industry." Is that a correct statement of the policy of the Public Works Administration? A. It is.

Q. On the question as to the merits of the projects of that type in the general category in which the Greenwood County project stands, did you, or do you, weigh any consideration other than those involved in other types of applications? A. No, we consider them all on

the same basis and applied the same principles on all of them regardless of the project.

(838) Q. To what extent, if at all, were you interested in the question of comparative rates to be charged by a proposed public utility to be operated by the municipality, as compared with the rates charged by private existing companies with which the city or municipally-owned project would have to compete, where the bonds were revenue bonds. A. Well, our interest in revenue bonds was whether or not—our interest in the matter of rates with reference to projects, where we took revenue bonds, simply went to the question of whether or not the rates to be charged would pay our loan within the time limited in the contract.

Q. In connection with the application of Greenwood County, did you take into account other considerations —considerations other than those to which you have heretofore referred? A. No.

Q. Did he (Mr. Rose who testified as a witness for the Federal Emergency Administration of Public Works on the original hearing) have any authority to speak for the Public Works Administration with respect to questions of policy? A. He was not authorized to speak for the Public Works Administration with respect to anything, policy included.

Q. Have you read the testimony given by Mr. Rose in this case? A. Yes, I have.

Q. Have you any comments to make with respect to it? A. Well, I think he was suffering from delusions of grandeur. He had no authority to expound, or determine, or say what the policy of the Public Works Administration was, and he certainly undertook to do that in large measures.

(839) Q. Was his testimony with respect to the rates of Greenwood County or the plaintiffs in this case, a correct statement of the policy, intentions, or purposes of the Public Works Administration? A. No, it was not. He may have been right on his figures on rates, which I am not competent to testify in respect to, but on policy he was not correct.

Q. Was his testimony with respect to the policy of the Public Works Administration concerning rates, so far as it differs from your previous testimony as to the policy of the Public Works Administration, correct? A. No.

Q. I call your attention to Plaintiffs' Exhibit #35 in this case, or to a copy of the same, a press release dated September 24th, 1934, of the Federal Emergency Administration of Public Works, and have handed you the same. Are you familiar with the terms of that press release? A. I am.

Q. Does it correctly set forth your policy in passing on applications for competitive electric power projects? A. Not standing alone.

Q. Insofar as it differs from your policy as stated in your testimony given today, which would be the more accurate; your testimony or that press release? A. The testimony I am giving today more accurately reflects the policy of the Public Works Administration.

Q. Then at the time of the issuance of that press release? A. It does.

(840) To each of the foregoing questions plaintiffs duly objected, on the grounds that the question did not relate to any change supervening since the original hearing and the entry of the original decree in this case; but relates to matters heard and determined on the original hearing of the case, and is irrelevant and immaterial to any matter properly before the Court on the retrial; each of the objections was overruled by the Court; and to each of said rulings an exception was duly taken by plaintiffs and allowed by the Court.

XXXI.

The Court erred in overruling the objections by plaintiffs to the following questions put by counsel for defendants to the defendant, Harold L. Ickes, on re-direct examination, and in admitting in evidence over the objection and exception of plaintiffs the testimony of said defendant in response to said questions, to-wit:

Q. In the case of the Greenwood County project, you would have made the loan and grant, regardless of your views as to whether the Duke Power Company's rates were, or were not high?

Objection by plaintiffs on the grounds stated above in Assignment No. XXX, and on the additional ground that the question calls for a conjectural conclusion by

the witness, and that the question is irrelevant and immaterial.

The Court overruled the objection and an exception was taken by plaintiffs and allowed by the Court.

A. We would have made the loan and grant to Greenwood County, regardless of the rates, or our opinion of the rates, of the Duke Power Company, if Greenwood County had the legal authority to enter into the contract with us, and if Greenwood County could satisfy us that it could liquidate the loan that we made.

Q. Those were the considerations?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. They were.

XXXII.

The Court erred in admitting in evidence on behalf of defendants, over the objection and exception of plaintiffs, defendants' Exhibit No. 70, a document, to-wit, "Letter from the Administrator of Public Works transmitting pursuant to Senate Resolution 190 a report of the business of the Federal Emergency Administrator of Public Works for the period ending February 15, 1934", which letter with the report attached was addressed to the Senate of the United States and was dated March 22, 1934.

The report purports to state the policies of the Public Works Administration as follows:

"The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works, thereby increasing the consumption of goods and also providing employment in the capital goods industries."

Counsel for plaintiffs objected to the introduction of the document on the grounds that it is hearsay and

a self-serving declaration, and that it does not relate to any change supervening since the entry of the original (841) decree and if admissible at all, was admissible on the original hearing.

Counsel for defendants stated that the document was offered as admissible on its own weight and as a public document representing the policy of the Public Works Administration.

The objection was overruled by the Court and an exception was taken by the plaintiffs and allowed by the Court.

Wherefore, plaintiffs pray that said decree be reversed and for such other and further relief as may be just and appropriate in the premises.

H. J. HAYNSWORTH,
R. T. JACKSON,
W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Duke Power Company and Southern Public Utilities Company, Plaintiffs.

18th June, 1937.

PRAECIPE.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
(842) WESTERN DISTRICT OF SOUTH CAROLINA.
IN EQUITY.

United States District Court
West. Dist. of So. Car.
JUL 1 1937
FILED
.....A. M. ..... P. M.
W. D. WHITE, Clerk.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and Harold L. Ickes as Federal Emergency Administrator of Public Works, Defendants.

It Is Agreed That the transcript of record to be certified on appeal to the United States Circuit Court of Appeals, for the Fourth Circuit, in the above-entitled cause, shall consist of the following:

1. The Bill of Complaint, with all of the exhibits which are attached hereto, with the exception of Exhibit III, and in lieu of Exhibit III there shall be inserted at the place where this exhibit would have been inserted the following statement:

Exhibit III attached to the complaint was the opinion of the South Carolina Supreme Court in the case of *Park* vs. *Greenwood,* which will be found reported in 174 S. C. 35, 176 S. E. 870, and except immaterial portions of Exhibit I, which by agreement between counsel are to be omitted in printing.

2. Subpoena in Equity showing service upon the defendants.

3. The Order making Harold L. Ickes a party de-
(843) fendant to the suit.

4. The Answer of Harold L. Ickes filed January 17, 1935, together with Exhibit "A" attached thereto Exhibit "A" being a copy of the Loan and Grant Agreement between Harold L. Ickes and Greenwood County, executed as of December 8, 1934.

5. The Answer of Greenwood County and its Finance Board, filed January 17, 1935, together with the Resolution of Greenwood County's Finance Board attached to that Answer.

6. Amended and Supplemental Bill of Complaint, filed February 4, 1935, except that Exhibit XII attached thereto is to be omitted in printing, this being incorporated herein as plaintiffs' Exhibit 35.

7. Motion of Greenwood County to dismiss the Amended and Supplemental Bill of Complaint, filed February 23, 1935.

8. The Motion of Harold L. Ickes to dismiss the Amended and Supplemental Bill of Complaint, filed April 9, 1935.

9. The Opinion of the Hon. H. H. Watkins of April 23, 1935.

10. The Order of the Hon. H. H. Watkins, refusing the Motion to Dismiss and referring the matter to W. M. Walters, Special Referee, dated April 29, 1935.

11. The Answer of Greenwood County to the Amended and Supplemental Complaint.

12. The Answer of Harold L. Ickes, dated February 12, 1935, to the Amended and Supplemental Complaint.

13. Statement of the Oral Evidence and Exhibits used on the trial before the Court sitting in Equity on July 19, 1935, which statement of evidence and exhibits was agreed to by counsel for the respective parties to the suit on September 27, 1935, and approved by His Honor, Judge Watkins, October 1, 1935.

(844) 14. The Statement of the motion of the defendants to strike out certain testimony made on July 19, 1935.

15. The opinion of the Hon. H. H. Watkins of August 10, 1935.

16. Decree for injunction filed August 26, 1935.

17. Assignments of Error filed on behalf of the defendants August 26, 1935.

18. The motion of Harold L. Ickes, Federal Emergency Administrator of Public Works, made before the Circuit Court of Appeals on December 5, 1935, with the contract of November 30, 1935.

19. Mandate of the Circuit Court of Appeals to the United States District Court, including the Order of the Circuit Court of Appeals of December 5, 1935.

20. Opinion of the Honorable H. H. Watkins of December 21, 1935.

21. Decree of Judge Watkins filed December 21, 1935.

22. Assignments of Error filed by the defendants, Greenwood County and its Finance Board, December 31, 1935.

23. Assignments of Error filed by the defendants, Harold L. Ickes, Federal Emergency Administrator of Public Works, December 31, 1935.

24. Amended Assignments of Error filed by Greenwood County and its Finance Board, January 17, 1936, as of Dec. 31, 1935.

25. Amended Assignments of Error filed by Harold L. Ickes, Federal Emergency Administrator of Public Works, January 17, 1936, as of Dec. 31, 1935.

26. Mandate of the United States Supreme Court of January 9, 1937, with the opinion of said Court referred to in said Mandate.

(845) 27. The order of Hon. J. Lyles Glenn entered pursuant to the mandate of the United States Supreme Court of January 19, 1937.

28. The supplemental answer of the defendant Greenwood County and E. L. Brooks, S. A. Agnew and

E. I. Davis, as members of and constituting The Finance Board for Greenwood County, omitting the contract of November 30, 1935, attached to said answer.

29. The supplemental answer of Harold L. Ickes as Federal Emergency Administrator of Public Works.

30. The plaintiffs' reply to the supplemental answers of the defendants.

31. The order of Hon. J. Lyles Glenn entered February 1, 1937, granting a preliminary injunction.

32. Statement of evidence under Rule 75, approved by Judge Glenn, July 1st, 1937.

33. Order for transmission of original exhibits.

34. Opinion of Hon. J. Lyles Glenn, together with findings of fact and conclusions of law entered June 2, 1937.

35. Decree of Hon. J. Lyles Glenn entered June 2, 1937.

36. Assignment of Errors by plaintiffs.

37. This *Praecipe* and Agreement as to transcript.

38. Clerk's Memoranda of the filing of petition for appeal, order allowing appeal, citation, appeal bond, acceptance of service of petition for appeal, order allowing appeal, and of citation, etc., in plaintiffs' appeal and also in the appeals of the defendants.

39. Stipulation that the record shall be printed under the supervision of the Clerk of the United States Circuit Court of Appeals, for the Fourth Circuit, in accordance with Rule 23 of that Court.

(846) 40. Assignments of error by defendants.

41. Clerk's Certificate.

This agreement as to the transcript shall be filed with the Clerk of the U. S. District Court, for the Western District of South Carolina, in lieu of *Praecipes* by the respective parties.

This July 1st, 1937.

W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs, Appellants.

RUPERT A. DAVIS,
W. H. NICHOLSON,
D. W. ROBINSON, JR.,
Attorneys for Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, Defendants, Appellees.

ROBERT E. SHER,
Attorney for Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendant, Appellee.

(847) **MEMORANDUM.**

(1) Petition for Appeal filed by Duke Power Company and Southern Public Utilities Company on June 18, 1937;

(2) Appeal of Duke Power Company and Southern Public Utilities Company allowed June 19, 1937;

(3) Copy of this Order Allowing Appeal lodged for adverse party, Greenwood County, etc., on June 24, 1937,

and lodged for adverse party, Harold L. Ickes, etc., on June 24, 1937;

(4) Appeal Bond: Duke Power Company and Southern Public Utilities Company.
Dated: June 21, 1937.
Penalty $500.00.
Obligors: Duke Power Company and Southern Public Utilities Company, as Principals.
Maryland Casualty Company, a Corporation of the State of Maryland, Baltimore, Maryland.
Conditioned for damages and costs.

(5) Citation—Dated: June 19, 1937; Acceptance of Service by Counsel for Greenwood County dated June 19, 1937. Acceptance of Service by Counsel for Harold L. Ickes dated June 22, 1937.

(1) Petition for Appeal filed by Harold L. Ickes, as Ickes, as Federal Emergency Administrator of Public Works, on July 1, 1937;

(2) Appeal of Harold L. Ickes, etc., allowed July 1, 1937;

(3) Copy of Order Allowing Appeal of Harold L. Ickes, etc., lodged for adverse party, Duke Power Company and Southern Public Utilities Company on July 1, 1937;

(4) Citation, dated July 1, 1937. Acceptance of Service dated July 1, 1937;

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(1) Petition for Appeal filed by Greenwood County etc., on June 19, 1937;

(2) Appeal of Greenwood County, etc., allowed June 19, 1937;

(3) Copy of Order Allowing Appeal of Greenwood County, etc., lodged for adverse party, Duke Power Com-

pany and Southern Pub. Utilities Co., June 21, 1937.

(4) Appeal Bond: Dated July 3, 1937.
Penalty $500.00.
Obligors: The County of Greenwood, by its Finance Board as Principal.
American Surety Company of New York, as Surety; Conditioned for costs.

(5) Citation, dated June 19, 1937. Acceptance of Service dated June 19, 1937.

(848) **STIPULATION FOR PRINTING OF RECORD UNDER RULE 23 OF THE UNITED STATES CIRCUIT COURT OF APPEALS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.
IN EQUITY.

United States District Court
West. Dist. of So. Car.
JUL 1, 1937
FILED
.....A. M. ●....P. M.
W. D. WHITE, Clerk.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,
vs.
Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

IT IS HEREBY STIPULATED AND AGREED that the Clerk of this Court shall make up a transcript of the record in the above-entitled cause and transmit the same to the Clerk of the United States Circuit Court of Appeals, for the Fourth Circuit, at Richmond, Va.; that said record be printed under the supervision of the Clerk

of that Court in accordance with Rule 23; and that the parties be governed by the terms of said rule.

W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs, Appellants.

RUPERT A. DAVIS,
W. H. NICHOLSON,
D. W. ROBINSON, JR.,
Attorneys for Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, Defendants, Appellees.

ROBERT E. SHER,
Attorney for Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendant, Appellee.

(849) **ASSIGNMENT OF ERRORS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

United States District Court
West. Dist. of So. Car.
JUL 1, 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,
vs.
Greenwood County and E. L. Brooks, S. A. Agnes and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

On this the 1st day of July, 1937, comes the defendant Harold L. Ickes, as Federal Emergency Administrator of Public Works, and says that the Decree entered in the above cause on the 2nd day of June, 1937, is erroneous and unjust as to the defendants:

1. Because the Decree provides that the costs should be divided equally between the plaintiffs and the defendants, the error being that under the law and the facts in this case the Court should have awarded the costs against the plaintiffs.

2. Because in any event the delay cannot be chargeable to defendant Ickes because said defendant was not a party in the case of *Park* vs. *Greenwood County*, 174 S. C. 35, 176 S. E. 870, and therefore could not and did not resist plaintiffs' petition for intervention.

WHEREFORE, this defendant prays that the Decree be reversed and that the Circuit Court of Appeals shall render a proper decree on the record.

JAMES W. MORRIS,
Assistant Attorney General.

ENOCH E. ELLISON,
Attorney, Department of Justice.

JEROME N. FRANK,
ROBERT E. SHER,
WILLIAM J. DEMPSEY,
Counsel.
Attorneys for Harold L. Ickes.

Service accepted July 1, 1937.

W. B. McGUIRE, JR.,
Atty. Plaintiffs.

(850) **ASSIGNMENT OF ERRORS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

United States District Court
West. Dist. of So. Car.
JUN 19 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting the Finance Board for Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

On this the 19th day of June, 1937, came the defendants, Greenwood County, and E. L. Brooks, S. A. Agnew, and E. I. Davis, as members of and constituting The Finance Board of Greenwood County, by their Solicitors, Rupert F. Davis, W. H. Nicholson, of Greenwood, S. C., and D. W. Robinson, Jr., of Columbia, S. C., and say that the Decree entered in the above cause on the 2nd day of June, 1937, is erroneous and unjust to the defendants:

1. Because the Decree provides that the costs should be divided equally between the plaintiffs and the defendants, the error being that under the law and the facts in this case the Court should have awarded the costs against the plaintiffs.

WHEREFORE these defendants pray that the Decree be reversed and that the Circuit Court of Appeals shall render a proper decree on the record.

(851)

W. H. NICHOLSON,
RUPERT F. DAVIS,
D. W. ROBINSON, JR.,
Attorneys for Greenwood County and its Finance Board.

June 19th, 1937.

(852) **CERTIFICATE OF CLERK.**

DISTRICT COURT OF THE UNITED STATES OF AMERICA.
WESTERN DISTRICT OF SOUTH CAROLINA.

I, W. D. WHITE, Clerk of the District Court of the United States for the Western District of South Carolina, do hereby certify that the writings annexed to this certificate, composed of Eight Hundred and Fifty-one pages, being the Transcript of the Record of all proceedings as agreed upon by counsel in the case of Duke Power Company and Southern Public Utilities Company, Appellants and Cross-Appellees, *versus* Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, Members of and Constituting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Appellees and Cross-Appellants, Docket No. E/451 (The Original of the writings appearing on pages 492 through 513, both inclusive, are not on file in this office) have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof, I have hereunto subscribed my name and affixed the Seal of the said Court at the City of Greenville, in the Western District of South Carolina, this tenth day of July, in the year of our Lord One Thousand Nine Hundred and Thirty-seven, and of the Independence of the said United States the One Hundred and Sixty-second.

(Seal) W. D. WHITE, Clerk.

(853) **SUPPLEMENTAL ASSIGNMENT OF ERROR AND ORDER FILING SAME.**

Filed July 13, 1937.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Duke Power Company and Southern Public Utilities Company, Appellants,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew, and E. I. Davis, Members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Administrator of Public Works, Appellees.

SUPPLEMENTAL ASSIGNMENT OF ERRORS.

Duke Power Company and Southern Public Utilities Company, appellants, file the following Supplemental Assignments of Error upon which, in addition to the assignments of error heretofore filed, they will rely on their appeal heretofore allowed by this Court from the decree of the District Court of the United States, for the Western District of South Carolina, entered on June 2, 1937.

XXXIII.

The Court erred in striking out, on motion of defendants and over the objection and exception of plaintiffs, the engineering testimony offered by plaintiffs tending to show the cost of the construction of the project and that the revenue bonds proposed to be accepted by the Administrator would not be reasonably secured.

XXXIV.

The Court erred in admitting in evidence on behalf of defendants, over the objection and exception of plaintiffs, as defendants' Exhibit 80, a letter from Harold L. Ickes, Administrator of Public Works, to the City of Couer d'Alene, Idaho, dated March 16, 1936.

Plaintiffs objected to the introduction of the letter upon the grounds that it is hearsay; is a self-serving declaration; and was written after the litigation had arisen in the Couer d'Alene case as well as after the litigation in the case at bar.

The objection was overruled and an exception taken by plaintiffs and allowed by the Court.

H. J. HAYNSWORTH,
R. T. JACKSON,
W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
(854) Attorneys for Duke Power Company and Southern Public Utilities Company, Appellants.

The filing of the foregoing Supplemental Assignment of Errors by appellants is allowed.

This July 13th, 1937.

JOHN J. PARKER,
Senior Circuit Judge.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

(833)

No. 4209.

Duke Power Company and Southern Public Utilities Company, Appellants and Cross-Appellees,

versus

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, Members of and Constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Appellees and Cross-Appellants.

CROSS-APPEALS from the District Court of the United States for the Western District of South Carolina, at Greenville. In Equity.

June 19, 1937, the cause is docketed on the original appeal papers.

PETITION OF APPELLANTS FOR A STAY OF PROCEEDINGS PENDING APPEAL.

Filed June 19, 1937.

(Style of Court and Title Omitted.)

Your petitioners, appellants in the above entitled case, respectfully show:

I.

This case is pending in this Court on the appeal of appellants from a final decree made and entered by the United States District Court, for the Western District of South Carolina, on June 2, 1937, denying plaintiffs the injunctive relief sought by their bill of complaint herein and dismissing the bill on its merits.

II.

The plaintiffs by their bill of complaint, as amended and supplemented, seek an injunction to restrain the Federal Emergency Administrator of Public Works from making advancements of federal funds, by way of a loan and grant to be made under the asserted authority of Title II of the National Industrial Recovery Act, to (834) Greenwood County and its governing authorities for the construction of a municipally owned power plant in Greenwood County, South Carolina, and to restrain the County and its governing authorities from receiving and using said federal funds in the construction and operation of said plant.

III.

The plaintiffs are electric utility corporations doing business in the State of South Carolina. Their business and rates are subject to the jurisdiction and control of the Public Service Commission of that State. If said federal funds are advanced by the Public Works Administrator to said County said plant will be constructed and operated in competition with plaintiffs to their serious and irreparable injury and damage. The immediate and direct damage from said loan and grant which plaintiffs will sustain from loss of business in the three Counties of Greenwood, Newberry and Laurens, South Carolina, alone, will amount to approximately $250,000 annually.

IV.

The suit was instituted in the Court below on November 7, 1934. Greenwood County and the members of its Finance Board were named as the original defendants. Harold L. Ickes as Federal Administrator of

Public Works intervened, and was permitted to become a party defendant on December 4, 1934.

The defendants moved that the bill of complaint as amended and supplemented be dismissed. The motion was denied by the District Court on April 19, 1935, for the reasons set out in the opinion of the Court, 10 Fed. Supp. 854.

The defendants were then permitted to file answers and, after hearing the case on its merits, the District Court on August 26, 1935 entered its final decree granting an injunction in favor of plaintiffs, 12 Fed. Supp. 71.

The defendants appealed to this Court from said decree. While the appeal was pending the defendants entered into a new loan and grant agreement dated November 30, 1935, in place of the original loan and grant agreement dated December 8, 1934. The new agreement (835) was called to the attention of this Court and made the basis of a motion that the case be remanded to the District Court. The motion was granted by this Court and the case accordingly remanded to the District Court, 79 Fed. (2d) 995.

Additional evidence was then taken in the District Court and after a hearing a second decree was entered by the District Court on December 21, 1935, refusing to set aside and vacate the original decree of injunction. From this second decree defendants again appealed to this Court. Upon the appeal being heard the decree of the District Court was reversed and the bill ordered to be dismissed, 81 Fed. (2d) 986.

On Petition of plaintiffs the U. S. Supreme Court granted a writ of certiorari May 8, 1936 (298 U. S. 651), and thereafter on December 14, 1936, without ruling on the merits, remanded the cause to the District Court with directions to vacate the decrees theretofore entered by that Court, to permit the parties to amend their pleadings in view of the alleged supervening change in the facts, and to re-try the case on the issues thus presented.

The District Court, by its order of January 19, 1937, vacated the decrees of August 26, 1935 and December 21, 1935 pursuant to the mandate of the Supreme Court. On February 1, 1937 the District Court, on motion of plaintiffs, granted a preliminary injunction restraining the defendants from proceeding in the premises dur-

ing the pendency of the suit and until the further order of the Court.

On February 23, 1937 the case came before the District Court for hearing on its merits. Additional evidence was introduced and after hearing the case the Court made findings of fact, stated conclusions of law, rendered an elaborate opinion, and entered its decree in favor of defendants, as hereinbefore alleged, and it is on plaintiff's appeal from this decree that the case is now pending before this Court.

V.

The nature of the case and the importance of the (836) questions involved therein will appear from the proceedings heretofore had in the case.

VI.

Appellants intend to prosecute the appeal with all possible dispatch, and, for the reasons hereinafter stated, they intend, unless this Honorable Court should suggest otherwise, to apply to the U. S. Supreme Court for a writ of certiorari as soon as a certified transcript of the record is docketed in this Court. In the meantime the appellees, unless restrained by this Honorable Court, intend, to the irreparable loss and damage of appellants, to proceed with the construction of said proposed plant by means of federal funds to be advanced by the Administrator to the County and its governing officials. This action of the appellees will in all probability, at least for all practical purposes render the suit moot. It would seriously hinder and embarrass, if not altogether frustrate, the further proceedings in the case and, would forestall and render of no effect any action which this Court of the U. S. Supreme Court might take after hearing the case.

VII.

That the status quo should be preserved is shown by the fact that the U. S. Supreme Court heretofore granted a writ of certiorari to review the former decision of this Court in the case. On the writ then granted the Supreme Court did not consider the merits of the case due to the

view which it took of the procedural questions presented by the record. The granting of the writ, however, was a determination by the U. S. Supreme Court that the case is of such importance as to warrant its review by that Court. In addition the Supreme Court on June 1, 1937 granted writs of certiorari to review three similar cases passed upon by the Court of Appeals for the District of Columbia, in which decrees refusing to enjoin the Administrator of Public Works from making similar advancements of federal funds had been entered. These cases are now pending before the U. S. Supreme Court and will be heard at the Fall Term 1937. In (837) each of the cases stay orders are in effect preventing any advancement of federal funds by the Public Works Administrator pending the determination of the cases by the U. S. Supreme Court. Unless this Honorable Court suggests otherwise, it is the intention of appellants to apply to the U. S. Supreme Court for a writ of certiorari to the end that this case may be heard by that Court along with the similar cases now pending before it.

VIII.

Appellants have been unable to apply to the U. S. District Judge who heard this case in the District Court and entered the decree appealed from for the restoration and continuance of the preliminary injunction granted by that Court because of the illness of the Judge rendering him unable to consider and pass upon the application.

WHEREFORE, petitioners pray this Honorable Court to restrain defendants from advancing, receiving or using federal funds for the construction of said project during the pendency of this appeal, to the end that the status quo may be preserved in the meantime, and for such other relief as may be appropriate in the premises,

H. J. HAYNSWORTH,
R. T. JACKSON,
W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Petitioners,
Appellants.

UNITED STATES OF AMERICA,
Western District of North Carolina,
County of Mecklenburg.

N. A. Cocke, being first duly sworn, deposes and says that he is an Officer of Duke Power Company, to-wit, the Vice President of said Company, one of the petitioners in the foregoing petition; that he has read said petition and knows the contents thereof, and that the statements contained therein are true to the best of his knowledge, (838) information and belief.

N. A. COCKE.

Sworn to and subscribed before me, this the 18th day of June, 1937.

(Seal of Notary)

JAS. S. SEASE,
Notary Public,
Mecklenburg County, N. C.

My Commission Expires June 18, 1939.

RETURN OF APPELLEES GREENWOOD COUNTY AND ITS FINANCE BOARD TO PETITION OF APPELLANTS FOR STAY OF PROCEEDINGS.

Filed June 19, 1937.

(Style of Court and Title Omitted.)

The Respondents, Greenwood County and its Finance Board, by way of return to the petition of the Plaintiffs for an order of supersedeas, would respectfully show to this Court:

1. That this Bill in Equity was instituted in the United States District Court for the Western District of South Carolina November 7, 1934. After the Bill had been amended and supplemented (Feb. 4, 1935) the defendants' motion to dismiss was refused by the District Court on April 23, 1935 (10 F. Supp. 854). Thereafter testimony was taken and the District Court on August 26, 1935, granted a decree of injunction against the de-

fendants (12 F. Supp. 71). This injunction decree remained in force and effect until the reversal by this Court of the decree of the District Court on February 22, 1936 (81 F. (2d) 986), and thereafter remained in force by reason of the stay order of this Court issued March 17, 1936 until vacated by the United States District Court January 19, 1937.

Certiorari to this Court was granted by the United States Supreme Court on the petition of the Duke Power Company May 18, 1936 (298 U. S. 651) and thereafter by that Court remanded to the United States District Court with directions to vacate the injunction order (81 L. Ed. 149).

After vacating the injunction order, on the 19th of January 1937, the United States District Court granted a temporary restraining order February 1, 1937. Thereafter the case was heard on its merits and the United (839) States District Court by its decree of June 1, 1937 denied injunctive relief, vacated the interlocutory injunction of February 1, 1937 and ordered the Bill dismissed.

2. It will be seen from the foregoing history of the case that the defendants have been actually enjoined from proceeding with the development of the Saluda River hydro-electric plant from August 26, 1935 until January 19, 1937, and from February 1, 1937 until June 1, 1937, and that during a portion of the period prior to the issuance of the District Court's injunction of August 26, 1935, it was apparent that the District Court, because of the reasoning in its opinion overruling the motion to dismiss, would grant an injunction when the testimony was before it. For all practical purposes, therefore, these defendants have been effectively restrained practically since the institution of the suit from doing any substantial work on the Buzzard Roost project.

3. In the testimony taken before the Honorable J. Lyles Glenn, District Judge, at Rock Hill in February, 1937, when this case was heard on the merits, it appears that the Duke Power Company, while the injunction was in force against Greenwood County, in October, 1936, authorized the building of a third steam unit for the development of power at Duke's River Bend plant near Charlotte, N. C., which plant is expected to be com-

pleted in the early part of 1938, and which plant, if it is run constantly, would develop about four times as much power as Greenwood County's Saluda River plant.

On information, advice and belief, the County avers that the development of this River Bend unit will place Duke in a better competitive position with Greenwood County and that it is inequitable to restrain the County from the development of its plant while Duke continues the development of the steam unit at River Bend.

4. That as shown in Title II of the National Industrial Recovery Act of 1933, Congress' purpose in ap-
(840) propriating the funds, a portion of which have been allotted to Greenwood County for the development of this project, was to increase employment quickly. This purpose has been found by the District Court and by this Court to be a proper national purpose and the actual purpose of Congress in enacting this law. These respondents would respectfully urge upon the Court the fact that since this Act was made law in May, 1933, some four years have elapsed and it is entirely possible that if the expenditure of this money is longer delayed, the National Congress or the Administrator of Public Works may decide that these funds cannot longer be held for the Greenwood County project and transfer the allotment to some project which would spend the money for the relief of unemployment quickly.

5. That since the institution of this Bill in November, 1934, Greenwood County has been forced, by reason of the injunction set out above, to take the chance of its allocation being revoked by the outcome of political campaigns in which the Chief Executive and a large portion of Congress were elected.

These respondents would also show to the Court that from the current discussions in Congress and in the Press there appears to be a substantial group in Congress who feel that Federal expenditures of the type involved in this litigation should be substantially curtailed in an effort to balance the budget and these respondents feel that if they are restrained by this Court from obtaining Federal funds their chances of completing the project will be substantially jeopardized, even though the litigation is eventually successful.

6. These respondents direct the Court's attention to the findings by the District Court to the effect that the Greenwood County project will produce comparatively such a small amount of power that it will not substantially effect the Duke Power Company. If the project is completed the chances of damage to Duke Power Company are substantially less than the chance Greenwood County is incurring by reason of the political un-
(841) certainties and other uncertainties which further delay would emphasize.

In this connection the County calls particular attention to the 21st finding of fact by Judge Glenn.

7. Greenwood County would respectfully show that after the orders of the District Court, the County obtained $140,000.00 from the Public Works Administration in March, 1937, of which $90,000.00 was earmarked for the acquisition of lands in the proposed basin. These respondents would respectfully show that the total cost of lands makes approximately $250,000.00; that the County has had titles to the property abstracted and surveys made and has secured options on most of the acreage, which expire June 30, 1937. It is imperative from the County's viewpoint that these options be exercised prior to that time, which is only possible if additional funds can be obtained from the Public Works Administration by way of loan or grant and if these options are not exercised these respondents anticipate there will be great difficulty in renewing them at their present favorable figures.

That the costs of labor and material since the County received bids on the Saluda River project in the summer of 1935 have substantially increased and these costs, particularly the cost of electrical machinery, are continuing to rise and the County's ability to build this plant within the allotted money is being jeopardized by the continued delay.

That by reason of this litigation which has continued over a period of more than two and one-half years, the County has been forced to incur additional engineering expenses, substantial Court and legal fees and further delay in obtaining the money and going forward with the project will result in a very substantial increase in the total aggregate cost of the project for these reasons.

8. The County would respectfully show to this Court that it is ready to expedite the appeal in any way it can; (842) it stands ready to agree promptly on a statement of the evidence with counsel for Duke Power Company and to cooperate in so far as possible with counsel for Duke Power Company in preparing the appeal; is ready and willing to have the appeal set down for any time which will suit the Court's convenience during the months of July or August in order that the appeal may be promptly disposed of, and if either side feels aggrieved by the decision of this Court, the Record may be filed in the United States Supreme Court in time for a decision by that Court during the Fall Term.

9. The respondents would further show that the County proposes to appeal from the portion of Judge Glenn's order dividing the costs and stands ready to perfect that appeal promptly and to have it heard as early as the convenience of the Court permits.

WHEREFORE these respondents ask that the Court refuse the petition for an order of supersedeas in this case and that the Court set the case down for trial as early as the Court's convenience permits, and direct counsel for all parties to cooperate in expediting the filing of the transcript in this Court.

W. H. NICHOLSON,
R. F. DAVIS,
D. W. ROBINSON, JR.,
Counsel for Greenwood County and its Finance Board.

June 18th 1937.

State of South Carolina,
County of Greenwood.

E. L. Brooks being first duly sworn, says:

That he is a member of the Finance Board of Greenwood County, one of the respondents in the above entitled action. That he has read the foregoing Return of Greenwood County and its Finance Board to the Petition of the Plaintiffs for an Order of Supersedeas and

the same is true of his own knowledge except as to matters therein stated on information and belief and (843) those he believes to be true.

E. L. BROOKS.

Sworn to before me this the 18th day of June, 1937.

W. R. DUNN (L. S.)
Notary Public for S. C.

ARGUMENT ON PETITION OF APPELLANTS FOR STAY OF PROCEEDINGS PENDING APPEAL.

June 19, 1937, (June term, 1937) cause came on to be heard on the petition of the appellants for a stay of proceedings pending appeal before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

ORDER RESTRAINING APPELLEES PENDING APPEAL.

Filed and Entered June 19, 1937.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 4209.

Duke Power Company and Southern Public Utilities Company, Appellants,

v.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, Members of and Constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Administrator of Public Works, Appellees.

ORDER

This is an application by appellants in the above entitled cause for an order preserving the status quo of the case pending the appeal. The appeal is from a final decree of the District Court of the United States, for the Western District of South Carolina, denying plaintiffs injunctive relief and dismissing their bill of complaint on the merits. A preliminary injunction was granted by the District Judge on February 1, 1937. Appellants have been unable to apply to the District Judge for an order restoring and continuing the preliminary injunction because of the illness of the District Judge.

The case was before this Court or two former appeals, (844) each of said appeals being by the defendants from injunctive decrees granted plaintiffs, (79 Fed. (2d) 995; 81 Fed. (2d) 986). On the second appeal of the defendants this Court reversed the decree of the District Court granting an injunction and ordered that the bill be dismissed. On petition of the present appellants the United States Supreme Court granted a writ of certiorari, May 18, 1936 (298 U. S. 651), and thereafter on December 14, 1936, without expressing an opinion on the merits, reversed the decree of this Court and remanded the cause to the District Court to vacate the decrees theretofore entered in the cause by that Court, to permit the parties to amend their pleadings and to retry the cause upon the issues thus presented. The present appeal is from the decree of the District Court entered in consequence of the re-trial.

The importance of the case and of the issues involved therein is shown by the action of the U. S. Supreme Court in granting the writ of certiorari to review the former decree of this Court. The attention of the Court has also been called to the fact that the U. S. Supreme Court on June 1, 1937 granted writs of certiorari directed to the United States Court of Appeals for the District of Columbia to review decrees entered by that Court in three similar cases. These cases are now pending before the U. S. Supreme Court and in all probability will be heard in the early part of the October Term 1937.

It thus appears that the U. S. Supreme Court has already determined that the questions involved in this case

are of such importance that they should be finally settled and determined by that Court. In the meantime for appellees to proceed with the undertaking, while the appeal is pending, would tend to frustrate the purpose of the appeal and, in the event of a reversal or modification of the decree appealed from, to render the action of the Appellate Court of no effect and to cause irreparable injury to appellants. Under these circumstances the rule is well settled that the status quo of the case (845) should be preserved pending the appeal, or until the further order of this Court. It is therefore,

ORDERED, ADJUDGED AND DECREED, that:

1. The defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, his attorneys, officers, agents, successors in office, and all persons acting in aid of them, and each of them, be, and they hereby are, restrained and enjoined during the pendency of this appeal, or until the further order of this Court, from in any manner aiding in the construction of the Buzzard Roost Project referred to and described in the original bill of complaint or any part of said project, except as hereinafter provided; and from advancing, lending, granting, or paying over to Greenwood County, or to any officer, agent, or representative of said County, any funds whatsoever of the United States for the purpose of constructing, financing, or operating said Buzzard Roost project or any part thereof, or from otherwise appropriating or permitting to be used any federal funds in furtherance of said project.

2. The defendants, Greenwood County, E. L. Brooks, S. A. Agnew, and E. I. Davis, as members of and constituting the Finance Board for Greenwood County, and all other officers, agents, or representatives of said County, and their successors in office, and each of them, be, and they hereby are, restrained and enjoined during the pendency of this appeal or until the further order of this Court, from receiving, accepting, or using, or permitting to be used, any funds of the United States for the purpose of constructing or operating said Buzzard Roost Project or any part thereof.

PROVIDED that the foregoing Order shall not pre-

vent the payment to Greenwood County, and the receipt by it, (in addition to funds already advanced) of a sum not in excess of One Hundred and Fifty Thousand Dollars ($150,000) for use by it in paying legal, engineering and other administrative expenses, and in the purchase of necessary land should an emergency arise for such (846) purchase, this exception being made without prejudice to the rights of any of the parties.

Dated this 19th day of June, A. D. 1937.

JOHN J. PARKER,
Senior Circuit Judge.

Endorsed:

Service accepted June 19, 1937.
D. W. ROBINSON, JR.
Atty. for Greenwood County.

Same day, to-wit, June 19, 1937, the appearance of W. S. O'B. Robinson, Jr. is entered for the appellants and cross-appellees.

June 21, 1937, certified copy of restraining order of June 19, 1937, transmitted to the Clerk of the District Court at Greenville, S. C.

June 24, 1937, the appearance of John W. Scott, Special Assistant to the Attorney General; Jerome N. Frank, Special Counsel Power Division, PWA; Robert E. Sher and William J. Dempsey is entered for Harold L. Ickes, as Federal Emergency Administrator of Public Works, appellee and cross-appellant.

Same day, the appearance of D. W. Robinson, Jr., W. H. Nicholson and R. F. Davis is entered for Greenwood County and its Finance Board, appellees and cross-appellants.

July 10, 1937, the transcript of record is filed.

Same day, the original petition for appeal, order allowing appeal of the Duke Power Company and Southern Public Utilities Company, bond and citation are certified up under section 7 of Rule 14.

Same day, the original petition for cross-appeal, order allowing cross-appeal of Greenwood County and its Finance Board, bond and citation are certified up under section 7 of Rule 14.

Same day, the original petition for cross-appeal, order allowing cross-appeal of Harold L. Ickes, as Federal (847) Emergency Administrator of Public Works, and citation are certified up under section 7 of Rule 14.

Same day, the original exhibits are certified up.

July 12, 1937, the appearance of James W. Morris, Assistant Attorney General, and Enoch E. Ellison, Attorney, Department of Justice, is entered for the appellees and cross-appellants.

SUPPLEMENTAL ASSIGNMENT OF ERRORS AND ORDER THEREON.

Filed July 13, 1937.

(Memo. of Clerk: This is printed at page 831 of the record and is, therefore, omitted here.)

July 23, 1937, twenty-five copies of volumes I and II of the printed record are filed.

July 26, 1937, the appearance of W. B. McGuire, Jr. is entered for the appellants and cross-appellees.

July 28, 1937, the appearance of Raymond T. Jackson is entered for the appellants and cross-appellees.

ARGUMENT OF CAUSE.

August 3, 1937, (June term, 1937) cause came on to be heard before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

OPINION.

Filed August 6, 1937.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 4209.

DUKE POWER COMPANY and SOUTHERN PUBLIC UTILITIES COMPANY,
Appellants and Cross-Appellees,

versus

GREENWOOD COUNTY and E. L. BROOKS, S. A. AGNEW and E. I. DAVIS, members of and constituting the Finance Board of Greenwood County, and HAROLD L. ICKES, as Federal Emergency Administrator of Public Works,
Appellees and Cross-Appellants.

Cross-Appeals from the District Court of the United States for the Western District of South Carolina, at Greenville.

(Argued August 3, 1937. Decided August 6, 1937.)

Before PARKER, NORTHCOTT and SOPER, Circuit Judges.

W. S. O'B. ROBINSON, JR. and RAYMOND T. JACKSON (NEWTON D. BAKER, W. R. PERKINS, H. J. HAYNSWORTH,

J. H. MARION and W. B. MCGUIRE, JR. on brief) for Appellants and Cross-Appellees, and W. H. NICHOLSON and D. W. ROBINSON, JR. (R. F. DAVIS and JAS. F. DREHER on brief) for Greenwood County and its Finance Board, Appellees and Cross-Appellants, and JEROME N. FRANK, Legal Counsel, Federal Emergency Administration of Public Works, and ENOCH E. ELLISON, Attorney, Department of Justice, (JAMES W. MORRIS, Assistant Attorney General; PAUL FREUND, Special Assistant to the Attorney General; E. H. FOLEY, JR., General Counsel; ROBERT E. SHER, Assistant Legal Counsel, and WILLIAM J. DEMPSEY, Special Counsel, Federal Emergency Administration of Public Works, on brief) for HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, Appellee and Cross-Appellant.

PARKER, Circuit Judge:

This is the third time that we have had before us the suit of the Duke Power Company and its subsidiary, the Southern Public Utilities Co., to enjoin the construction by Greenwood County, S. C. of a power dam at Buzzard Roost Falls on the Saluda River and to enjoin Harold L. Ickes, the Federal Administrator of Public Works, from making a loan and grant of $2,852,000 to the county under the provisions of Title II of the National Industrial Recovery Act, 48 Stat. 200, for the construction of the project. Upon the first appeal we remanded the cause in order that the court below might reconsider its decision in the light of a new contract which had been entered into between the county and the Administrator of Public Works. *Greenwood County v. Duke Power Co.* (C. C. A. 4th) 79 Fed. (2d) 995.

On the second appeal, we reversed the decree of the District Court granting an injunction, and directed that the bill of complaint be dismissed for want of equity,

holding: (1) that the courts were bound by the finding of the Administrator that the project could be constructed within the limits of the loan and grant and would be a self liquidating project within the meaning of the Act of Congress and the policy of the Public Works Administration; (2) that we were bound by the decision of the South Carolina Supreme Court in *Park* v. *Greenwood County* 174 S. C. 35, 176 S. E. 870 to the effect that the construction of the power plant and the issuance of revenue bonds to pay for same were within the the powers of the county; (3) that the statute under which the Administrator proposed to make the loan was constitutional; (4) that the Administrator was acting within his powers in making same; and (5) that no legal right of plaintiffs was infringed by the making of the loan or the construction of the project, and that plaintiffs for this reason were not entitled to an injunction in any event. *Greenwood County* v. *Duke Power Co.* (C. C. A. 4th) 81 Fed. (2d) 986. The Supreme Court granted certiorari and held that we had erred in our order remanding the case on the first appeal in that we had not vacated the decree appealed from, and that this error on our part had misled the District Judge so that he unduly limited the hearing upon the remand. It declined therefore, to pass upon any of the questions upon which we had ruled on the second appeal, but remanded the cause to the District Court with direction that the decree entered by that court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts and that the cause be retried upon the issues thus presented. *Duke Power Co.* v. *Greenwood County* ..... U. S. ....., 57 S. Ct. 202.

Upon receipt of mandate from the Supreme Court the District Court entered an order setting aside the decrees which it had theretofore rendered, permitted amended pleadings to be filed and set the case down for hearing *de novo* over the protest of counsel for plaintiffs, who contended that the hearing should be

limited to matters which had occurred subsequent to the first appeal. As we interpret the opinion of the Supreme Court, however, the course adopted by the District Judge was entirely correct. The case was one in which it appeared, to use the language of the Supreme Court, that supervening facts required "a retrial in the light of a changed situation"; and, in passing upon the effect of the new contract and the relief appropriate in the light of the changed situation, there was no reason why the District Judge should have considered himself limited in any way by the evidence introduced or findings made upon prior hearings. The setting aside of the decrees in the District Court left the cause in precisely the position that it would have occupied if no final decree had ever been entered; and we think there can be no doubt as to the power of the court in an equity cause, until final decree has been entered, to hear additional evidence and modify or set aside any finding of fact theretofore made. *Fourniquet* v. *Perkins* 16 How. 82; *Glades County* v. *Detroit Fidelity & Surety Co.* (C. C. A. 5th) 65 Fed. (2d) 252; *Wagner* v. *Meccano* (C. C. A. 6th) 235 Fed. 890; *Dangerfield* v. *Caldwell* (C. C. A. 4th) 151 Fed. 554. The opinion of the Supreme Court determines none of the issues raised in the cause but directs that, after the pleadings shall have been amended, it "be retried upon the issues then presented"; and it is well settled that the granting of a new trial by an appellate court reopens every issue in the case, except as to questions definitely and finally determined upon the appeal. *American Surety Co.* v. *Jackson* (C. C. A. 9th) 26 Fed. (2d) 248; *Shell Petroleum Corp.* v. *Shore* (C. C. A. 10th) 80 Fed. (2d) 785; *Glades County* v. *Detroit Fidelity & Surety Co.*, *supra*; *Cyclopedia of Federal Procedure*, vol. 6, p. 820.

Upon the retrial had in the court below the evidence theretofore taken in the cause was introduced, including the new contract and the other evidence received following the first remand, as well as the evidence taken prior

to the first appeal. Additional evidence was also introduced bearing upon the loss which plaintiffs would sustain from competition resulting from the construction of the project and upon the consideration given by the Administrator and his subordinates to the effect on power rates of other projects for which application for loans and grants had been made. The judge below filed an exhaustive opinion upon all of the questions presented and set forth his findings of fact and conclusions of law fully and completely as required by the equity rules. He held the statute under which the loan and grant were made to be constitutional and the action of the Administrator in making same to be a valid exercise of his authority under the statute. He dismissed the bill, therefore, taxing one-half of the costs, however, against the defendants on the ground that they had prolonged the litigation by opposing the application of plaintiffs to intervene in the case of *Park* v. *Greenwood County* 174 S. C. 35, 176 S. E. 870, when that cause was pending before the Supreme Court of South Carolina. From the decree dismissing the bill, the plaintiffs have appealed, and the defendants have appealed from so much of it as taxes them with costs. The appeals present four questions for our consideration: (1) whether the statute under which the Administrator has made the loan and grant is a valid exercise of Congressional power, (2) whether the making of the loan and grant by the Administrator is within the power granted him by the statute, (3) whether, in any event, any right of plaintiffs is violated by the making of the loan and grant, and (4) whether any costs should have been taxed against defendants.

STATEMENT OF FACTS.

The facts are as follows: the plaintiff power company, which operates in the Piedmont section of the Carolinas, and to which we shall hereafter refer as the

plaintiff, is the only large power company doing business in Greenwood County, South Carolina, and surrounding counties. The record shows, however, that it furnishes not exceeding 15% of the power now used in Greenwood County, the remainder being supplied by steam plants of manufacturing companies. After the passage of the National Industrial Recovery Act in 1933, officials of that county, without solicitation or suggestion from the Public Works Administration, conceived the plan of obtaining authority from the State of South Carolina for the construction by the county of a dam and power plant at Buzzard Roost Falls on the Saluda River and of obtaining a grant and loan from the Public Works Administration for financing the project. Authority from the state was duly obtained (XXXVIII S. C. Stats. 411, 1392) and application for loan and grant in the total sum of $2,800,000 was made by Greenwood County to the Administrator of Public Works in November 1933. Without consulting with the Public Works Administrator, the county prepared and included in its application a schedule of rates to be charged for the sale of electric energy to the various classes of its proposed customers. Notwithstanding the change in the contracts between the county and the Administrator, to which we shall refer hereafter, these rates have never been changed.

After full consideration of the application by the Administrator of Public Works, an allotment was made for this project on June 19, 1934, and was approved by the President of the United States on the following day. Plaintiff having asked to be heard in opposition to the allotment was accorded a hearing on July 2, 1934, and the matter was held in abeyance until November 7th, when the allotment was reaffirmed by the Administrator and the President. A contract was thereupon entered into between the Administrator and the county on December 8, 1934, under which the Administrator agreed to make a grant to the county for the development of the

project of thirty per cent of the cost of labor and materials, not to exceed the sum of $682,000, and to buy such portion of the $2,219,000 of 4% revenue bonds to be issued by the county for its construction as should not be sold to outside parties. One of the provisions of the contract was that the government should be under no obligation to take the bonds or make any portion of the grant if the county should not have adopted a schedule of rates satisfactory to the Administrator. After the decision of the Circuit Court of Appeals of the Eighth Circuit in *Arkansas-Missouri Power Co.* v. *City of Kennett* 78 Fed. (2d) 911, holding that the execution of a contract with such a provision was beyond the power of a municipal corporation of Missouri, and after the decision of Judge Watkins below, holding that such a provision gave the Administrator control over the rates to be charged, this provision was eliminated from all contracts thereafter executed by the Administrator; and on November 30, 1935 the county and the Administrator entered into a new contract superseding that of December 8, 1934. The new contract gave the Administrator no power whatever with respect to rates to be charged by the county, and contained the following provisions:

"12. The Administrator and the Government shall have no right or power of any kind with respect to the rates to be fixed or charged for the services and facilities afforded by the project, excepting only such rights as they may have as a holder of such bonds under the laws and Constitution of South Carolina, and the lawful proceedings of the applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

"13. This agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the applicant and the government or any of its agencies in any way relating to said project."

It is the contention of plaintiff that the loan and grant were made to the county by the Administrator for the purpose of affecting the rates charged by plaintiff for electric power, and at all events, that the inevitable effect of the construction of the project will be to lower rates in the territory in which plaintiff operates; and much testimony was adduced as to the policy of the Public Works Administration in approving loans and grants for power projects. As to this it appears that the Electric Power Board of Review which was set up in 1933, but which was abolished by order of the Administrator on March 16, 1935, did have a policy with respect to approving loans to municipal power projects to the effect that such projects should meet standards of social desirability, as well as engineering soundness and reasonable security. Social desirability, under this policy, depended among other things upon whether or not the municipal project would provide current at rates substantially less than those at which it was provided by an existing utility; and, in cases where such utility would lower its rates to meet those proposed by the municipality, the policy was not to approve the municipal project. After the Electric Power Board of Review was abolished, the Power Division of the Public Works Administration was placed in charge of the approval of applications for loans and grants for power projects; and its policy has been that, for a municipal power project which is to be financed by revenue bonds to secure approval, its proposed rates must be sufficiently low to secure business and sufficiently high to take care of the interest and amortization payments on the bonds (R. 671). Social desirability is assumed when the application comes from a city. (R. 672). The Administrator testified that there has in reality been no change in the policy of the Public Works Administration with respect to power loans (R. 656); that they were considered on the same basis as other loans, the primary consideration be-

ing "social desirability, ability of the community to finance its share of it and its relationship to the question of unemployment" (R. 647); and that, in the case of a project to be financed by revenue bonds, the only interest which the Administrator had in the rates was whether or not the rates to be charged would repay the loan within the time limited in the contract. (R. 647).

The fact seems to be that the policy of the Public Works Administrator has been to take into consideration the rates of competing utilities in considering applications for loans and grants for the construction of municipal power plants, and that one of the chief reasons for this is that the construction of a municipal plant would not ordinarily be a financially sound proposition unless it should be able to obtain business in competition with existing utilities; that, in the beginning, much emphasis was placed upon the social desirability of lowering power rates to the public; but that, after the policy of the Public Works Administration had been attacked on the ground that, by attempting to bring about lower power rates, it was interfering with a matter reserved to state control, this emphasis on "social desirability" of lower rates has been largely abandoned and the consideration of competitive rates has been had with reference to the financial security of the loan rather than the "social desirability" of the enterprise, the lowering of rates being regarded as an incidental result of the policy of making such loans and grants and not as one of the chief purposes thereof. In this connection, and as bearing upon the reasonableness of the contention that the Administrator has been abusing the power committed to him for the purpose of affecting local power rates, it appears that as of January 1, 1937, there were 9389 "non-federal" projects of the Public Works Administration, of which only 282 were power projects. Of these only 92 involved competition with existing private companies; and the total amount of money involved in these 92 pro-

jects was only $27,339,947.00, as compared with $1,480,612,543 involved in the 9389 non-federal projects, or less than 2%.

As to the policy applied in making the grant and loan here under consideration, the evidence is that the Public Works Administration had nothing to do with fixing the rates to be charged by the County; that there was no intention, in making the loan and grant, to affect the rates of plaintiff, and that those rates were taken into consideration only in connection with the financial security of the loan. As to this the Judge below found:

"XVIII.

"I find that the defendant, Harold I. Ickes, Federal Emergency Administrator of Public Works, in making this allotment of funds to Greenwood County and in entering into the contract with the county, had no purpose other than that set out in the Act of Congress and that the policy of the Public Works Administration is correctly set out in the Administrator's report to the United States Senate, (73rd Congress, 2nd session, Senate Document 167; Defendant's Exhibit 70):

"'The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works, thereby increasing the consumption of goods and also providing employment in the capital goods industry.'

XIX.

"In view of the fact that the proposed loan to Greenwood County was to be evidenced by revenue bonds, it was necessary for the Public Works Administration, in order to carry out Congress' mandate that the loan should be reasonably secured (48 Stat., 203), to examine into the rates of the plaintiff who operated in the territory in which the Greenwood project would be developed. It was necessary that the Administrator be satisfied that the County's proposed rates were low enough to obtain customers and high enough to yield a revenue sufficient to liquidate the bonds."

As to the contention that the construction of the project would necessarily affect rates, the Judge below found, and his finding is amply supported by the testimony, that the county project would not serve as a yardstick for the fixing of private utility rates because of the difference in construction costs, difference in overhead, freedom from taxation etc. He further found that any effect which the construction of the county project will have on plaintiff's rates will be the result of the voluntary construction of an electric project by the county and the voluntary decision of the county to use that project in competition with plaintiff. As to the extent of this competition, he found that at the most the county plant will produce only about 25,000,000 K. W. H. of electricity; that the county has plans to sell only 12,000,000 K. W. H. of this to those who are now customers of plaintiff; that in 1936 plaintiff sold 2,476,000,000 K. W. H. in the Piedmont Section of the Carolinas; and that this was an increase of 380,000,000 K. W. H. over its 1935 sales. In other words the business which the county project will take from plaintiff is less than one half of one per cent of the business which it did in 1936 and less than four per cent of the amount by which that business was increased over the business of 1935. There is evidence that the gross income of the business which will be taken from plaintiff by the county contracts amounts to about $250,000 per year; and there is evidence that the demand for electric current is constantly growing and that new construction is constantly being required of plaintiff to take care of the growing demand.

THE CONSTITUTIONALITY OF THE STATUTE.

The question of the constitutionality of the statute (Secs. 201 et seq. of Title II of the National Industrial Recovery Act) was so thoroughly considered by us on the former appeal that we feel that we need do little more than refer to our former opinion for an expression of our

views. See 81 Fed. (2d) at pages 991 to 995. Confusion in thinking results from the method employed by plaintiff of arguing that the statute is unconstitutional "as applied by the Public Works Administrator" in making the loan and grant here under consideration. This involves, of course, two questions: (1) the validity of the Act of Congress when tested by the Constitution, and (2) the authority of the Administrator when tested by the Act of Congress. A statute may not be held void because of the action of an executive officer in applying its provisions. Even when there is an abuse of executive power against which the courts cannot relieve because of their inability to control administrative discretion, the Act of Congress under which the action is taken is not rendered invalid any more than it is by action which is absolutely unauthorized. The constitutional validity of the statute must be considered, therefore, without reference to what the Administrator is doing under it; and, for the reason set forth in our former opinion, we think it is a valid exercise by Congress of the power to tax and spend for the general welfare, that it cannot be condemned as an invasion of the powers reserved to the states under the 10th Amendment and that it does not embody an unconstitutional delegation of legislative power to the executive.

Our conclusion that it is within the power of Congress to tax and spend for the relief of unemployment nation wide in scope, and that the construction of a nation wide program of public works is an appropriate exercise of the power, is fortified by the recent decisions of the Supreme Court upholding the Social Security Act, particularly the case of *Chas. C. Steward Mach. Co.* v. *Davis* ..... U. S. ....., 57 Sup. Ct. 883, wherein the Court, speaking through Mr. Justice Cardozo, said:

"During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights.

Often the average was more than 10 million, at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States* v. *Butler*, 297 U. S. 1, 65, 66, 56 S. Ct. 312, 319, 80 L. Ed. 477, 102 A. L. R. 914; *Helvering* v. *Davis*, 300 U. S. ....., 57 S. Ct. 904, 81 L. Ed. ....., decided herewith. The nation responded to the call of the distressed. Between January 1, 1933, and July 1, 1936, the states (according to statistics submitted by the government) incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938 the national government expended for public works and unemployment relief for the three fiscal years 1934, 1935, and 1936, the stupendous total of $8,681,000,000."

In *Helvering* v. *Davis* ..... U. S. ....., 57 Sup. Ct. 904, another case involving the Social Security Act, the Court, again speaking through Mr. Justice Cardoza, said:

"Congress may spend money in aid of the 'general welfare.' Constitution art. 1 sec. 8; *United States* v. *Butler*, 297 U. S. 1, 65, 56 S. Ct. 312, 319, 80 L. Ed. 477, 102 A. L. R. 914. *Steward Machine Co.* v. *Davis, supra.* There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision. *United States* v. *Butler, supra.* The conception of the spending power

advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. *The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.* This is now familiar law. 'When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.' *United States* v. *Butler, supra,* 297 U. S. 1 at page 67, 56 S. Ct. 312, 320, 80 L. Ed. 477, 102 A. L. R. 914. Cf. *Cincinnati Soap Co.* v. *United States,* 300 U. S. ....., 57 S. Ct. 764, 81 L. Ed. ....., May 3, 1937; *United States* v. *Realty Co.,* 163 U. S. 427, 440, 16 S. Ct. 1120, 41 L. Ed. 215; *Head Money Cases,* 112 U. S. 580, 595, 5 S. Ct. 247, 28 L. Ed. 798. Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times.

"The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from state to state, the hinterland now settled that in pioneer days gave an avenue of escape. *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 442, 54 S. Ct. 231, 241, 78 L. Ed. 413, 88 A. L. R. 1481. *Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation.* If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co., supra,* has set the doubt at rest." (Italics ours).

Likewise, our conclusion that the statute cannot be condemned as an invasion of the reserved powers of the

states is fortified by the decision in *Steward Mach. Co.* v. *Davis, supra*, wherein the Court said that before a statute could be condemned on this ground there must be a showing that the things which it authorizes are "weapons of coercion, destroying or impairing the autonomy of the states." 57 S. Ct. 890. The carrying out of the program of public works authorized by the statute for the relief of unemployment cannot possibly have this effect; and, specifically, the making of loans and grants to municipal corporations to enable them to engage in enterprises which the states have authorized them to engage in cannot, in any use of language, be said to abridge or invade the powers of the states. As we said in our former opinion, "It is an entirely different thing from giving or lending money to private persons for the purpose of defeating a state policy or regulating matters under state control." Any effect which such loans and grants may have upon rates will be incidental to the competition engendered by the construction of the projects; and where the state itself authorizes the projects and the procuring of the loans and grants for their construction, as did South Carolina in this case (*Park* v. *Greenwood County, supra*), and retains the right of regulating the rates through the exercise of state power, it cannot be contended with any show of reason that the power of the state is encroached upon by the making of the loans and grants or by the competition resulting from the construction of the projects which they make possible.

As to the delegation of legislative power to the executive, we pointed out in our former opinion that it was out of the question for Congress to have prescribed the details of an extensive program of public works for the relief of the national emergency; that Congress had appropriated the money for the purpose, had laid down in the statute the principles which were to guide the President and the Administrator in its expenditure and had left to them the working out of the details; and that

the selection of projects and the making of loans and grants in carrying out the policy thus laid down by Congress was the exercise of administrative, not legislative, discretion. At least as to the classes of projects enumerated in Sec. 202 [and the project here falls within classes (a), (b) and (c)], Congress "lays down a legislative standard and declares a legislative policy with requisite definiteness and impliedly directs the President to effectuate the purposes of the Act and to make loans and grants, within the limits of a reasonable administrative discretion, to projects that fall within the classes enumerated in section 202 and the limitation of 203 and 206". *Kansas City Gas & Electric Co.* v. *City of Independence* (C. C. A. 10th) 79 Fed. (2d) 32, 43.

In addition to this, it is clear that Congress has ratified and approved the program of public works formulated by the executive department under the act, by making additional appropriations for the carrying out of the program which had been laid before it. In response to Senate Resolution No. 100, 73d Congress, approved February 15, 1934, the Administrator, on March 26, 1934, submitted a report to the Senate (Senate Document 167, 73d Congress, Def. Ex. No. 70) for the period ending February 15, 1934. The report contains a list of federal and non-federal projects and includes the project here involved in a list of those on which final action had not been taken at that time (p. 173). Three months later, Congress passed the Emergency Appropriation Act, approved June 19, 1934, c. 648, 48 Stat. 1021, 1055 making available additional funds for carrying out the program. The following year Congress enacted the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, which continued the existence of the Public Works Administration and authorized the continuance of its functions. An amendment offered in the Senate which would have required the selection of projects that would not compete with private enterprise was rejected. 79 Cong. Record 3972, 3973. On March 6, 1936 the Administrator,

at the request of the Senate, reported to it a list of power projects which had been delayed as a result of litigation and included in the list the project here involved. 74th Cong., 2d Sess. Sen. Doc. 184. Thereafter the First Deficiency Appropriation Act, fiscal year 1936, was adopted. 49 Stat. 1597, 1608. That Act provided that a time limitation of July 1, 1938 which it prescribed should not apply to "any project enjoined in any federal of state court", and appropriated $300,000,000 to increase employment by providing for useful public works projects "of the kind and character for which the Federal Administrator of Public Works has heretofore made loans or grants pursuant to Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935". Finally Congress passed the Public Works Administration Extension Act of 1937, containing the provisions of law relating to the availability of funds for carrying out the function of the Public Works Administrator to July 1, 1939. Sec. 201, Title II, Pub. Res. No. 47, 75th Congress. "It is well settled that Congress may, by enactment not otherwise inappropriate, ratify * * * acts which it might have authorized". *Swayne & Hoyt* v. *United States* ..... U. S. ....., 57 S. Ct. 478, 480; *Isbrandtsen-Moller Co.* v. *United States* ..... U. S. ....., 57 S. Ct. 407. If, therefore, it could be held that the National Industrial Recovery Act did not lay down sufficiently precise standards for the exercise of the discretion reposed in the executive, it is clear that this defect has been cured by the subsequent legislation recognizing and approving the action taken by the Administrator and appropriating funds for the carrying out of the program of public works which he has prepared.

We think, however, that there is no need to rely upon this ratification by Congress of this program of the Administrator. The original statute was valid and not to be condemned as an unconstitutional delegation

of legislative power. As said by the Supreme Court in the recent case of *Cincinnati Soap Co.* v. *United States* ..... U. S. ....., 57 S. Ct. 764, 770:

"That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. A striking and pertinent example is afforded by the Act of June 17, 1902, c. 1093, 32 Stat. 388, where all moneys received from the sale and disposal of public lands in a large number of states and territories are set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories. The expenditures are to be made under the direction of the Secretary of the Interior upon such projects as he may determine to be practicable and advisable. The constitutionality of this delegation of authority has never been seriously questioned. See *United States* v. *Hanson* (C. C. A.) 167 F. 881, 884, 885."

THE EXERCISE OF POWER BY THE ADMINISTRATOR.

There can be no question but that the making by the Administrator of loans and grants to an enterprise of the character here involved is authorized by the statute. Sec. 201 of Title II of the National Industrial Recovery Act, 48 Stat. 200, authorizes the President to appoint an Administrator of Public Works and Sec. 202 requires that the Administrator, under the direction of the President shall prepare a comprehensive program of public works, including construction of publicly owned instrumentalities, development of water power and transmission of electrical energy, and any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public. A municipal power plant falls squarely within all three of these classes; and, if

there were otherwise any doubt about the matter, the subsequent legislation to which we have referred, enacted with full knowledge on the part of Congress of the program prepared by the Administrator and of the fact that it included the project here under consideration as well as a number of other non-federal power projects, would remove every basis of controversy with respect thereto. The Administrator, then, is acting within the express authority of the statute when he makes a grant or loan to a municipal power plant such as we have here.

The contention of the plaintiff is that the action of the Administrator in making such a loan and grant should be enjoined in the ground that, in making same, he is actuated by the motive of reducing power rates and that, in any event, the construction of the project made possible thereby will have that effect. There are several answers to this, each of which seems to us to be complete and final.

In the first place, the court below has found, and the finding is supported by evidence, that the Administrator was not actuated by such motive in making the loan and grant to the county; that the Administrator will have no power to coerce or control the action of the county in the matter of rates; that any effect which the construction of the project will have on the rates will be the result of competition which the county will voluntarily enter into; and that on account of differences in cost, overhead, taxes etc. the project will not provide a criterion for the fixing of rates of private enterprises. The contention of plaintiff, therefore as to the motive in the making of the loan and grant here involved must fail on the facts.

In the second place, the Administrator in selecting projects to which loans and grants are to be made under the statute must necessarily exercise an administrative discretion, so as to extend aid to projects which are financially sound and the construction of which will be in the public interest. If, in exercising this discretion,

he adopts the policy of not making loans and grants for municipal projects which will not provide rates to the public lower than competing private enterprises, such policy would seem to accord both with sound finance and with the requirements of justice to existing enterprises. Certainly, a municipal enterprise would have small chance of success if its rates were above those of an existing private utility; and it would not be fair to such utility to encumber the field with a competing enterprise when it was furnishing current to the public as cheaply as such competitor could furnish it. There is nothing in law or common sense which requires the Administrator to ignore such considerations in the exercise of the discretion reposed in him. Congress could certainly have provided that no loans or grants should be made under the Act to a municipal enterprise in cases where an existing private enterprise was furnishing service to the public as cheaply as the municipal enterprise would furnish it; and we see no reason why such criterion may not and should not be adopted by the Administrator. He is not required to select the projects on his program by lot or to close his eyes to the interests of the public or the social desirability of projects among which he must choose. Few projects would seem to have greater social desirability than those which will result in the utilization of undeveloped natural resources and will help supply the rapidly increasing demand for electric power; and we cannot see that it is a valid objection to the selection of such projects that the competition which will be engendered by them may result in the lowering of electric power rates to the public.

In the third place, even if the Administrator have the motive attributed to him by plaintiff, and even if this be an improper motive, the validity of his action is not affected thereby. Equity will restrain where there is lack of power on the part of a public officer, not where there is mere abuse of power in doing from a wrong motive or to accomplish an ulterior purpose that which

the law authorizes. To grant injunction in the latter case would be for the courts to control the executive in the exercise of executive discretion, a thing which under our tripartate form of government they have no power to do. *Isbrandtsen-Moller Co.* v. *United States* ..... U. S. ....., 57 S. Ct. 407, 410; *Dakota Central Telephone Company* v. *South Dakota* 250 U. S. 163, 184; *Louisiana* v. *McAdoo* 234 U. S. 627, 633; *Philadelphia Co.* v. *Stinson* 223 U. S. 605, 620; *Ferris* v. *Wilbur* (C. C. A. 4th) 27 Fed. (2d) 262, 264; *Appalachian Electric Power Company* v. *Smith* (C. C. A. 4th) 67 Fed. (2d) 451, 454. In the case last cited, there were allegations in the bill as to abuse of authority by the members of the Federal Power Commission, as well as allegation with respect to action without authority. In refusing to consider the allegations as to abuse of authority, we said:

"The allegations and prayers of the bill which relate to abuse of authority by the commission need not be considered; for it is clear that it is only on the allegations of want of statutory or constitutional authority that the suit against the commissioners as individuals could under any theory be sustained."

The question was squarely before the Supreme Court in *Dakota Central Tel. Co.* v. *South Dakota, supra,* 250 U. S. 163, which involved the taking over of the telephone companies by the President under a statute enacted under the war power. It was argued that the action of the President was an abuse of the discretion vested in him as the war had virtually ended and the action taken was not for the purpose of prosecuting the war but for regulating telephone rates. (See argument 250 U. S. at 177). In disposing of this contention the Court, speaking through Chief Justice White, said (p. 184):

"The proposition that the President in exercising the power exceeded the authority given him is based upon two considerations. First, because there was

nothing in the conditions at the time the power was exercised which justified the calling into play of the authority; indeed, the contention goes further and assails the motives which it is asserted induced the exercise of the power. But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. *This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.*" (Italics ours).

The fact that the competition which will result from the project may have some effect upon plaintiff's rates cannot affect the validity of the action of the Administrator any more than his motives. It is true, of course, that neither Congress nor the Administrator may do something which they are forbidden to do by calling it something else; but the exercise of a granted power is not rendered unlawful by reason of its incidental effects. *Sonzinsky* v. *United States* ..... U. S. ....., 57 S. Ct. 554, 556; *Magnano Co.* v. *Hamilton* 292 U. S. 40, 44-47.

PLAINTIFF'S RIGHT TO RELIEF.

As we pointed out in our former opinion (81 Fed. (2d) at pp. 997-999), plaintiff is not entitled to the injunction which it asks, irrespective of the constitutionality of the statute or the authority of the Administrator, for the reason that none of its rights is infringed by the making of the loan and grant. Plaintiff argues that the remanding of the case by the Supreme Court amounted to a decision of this point in its favor; but that court expressly declined to express any opinion on the merits and, in the absence of an express holding by it to the contrary, we are of opinion that our former holding with respect to this matter was correct. It is elementary that before a party is entitled to injunctive relief it must

appear that some right of his is threatened with invasion by the action of which he complains. *United Fuel Gas Co.* v. *Railroad Com.* 278 U. S. 300, 310. Now, the action complained of is the making of the loan and grant to the county out of the funds of the United States. While some state courts recognize the right of a taxpayer to enjoin the unauthorized use of public funds, it is well settled in the federal courts that such use of the funds of the United States violates no right of the taxpayer of which he may complain. *Frothingham* v. *Mellon* 262 U. S. 447. Plaintiff contends, however, that the lending of such funds to the county in order that it may engage in competition with plaintiff violates its rights; but the answer to this is that competition by the county violates no rights of plaintiff. *Puget Sound Co.* v. *Seattle* 291 U. S. 619; *Madera Water Works* v. *Madera* 228 U. S. 454. It is true that grounds for relief may exist against action innocent in itself if taken to enable another to violate rights of complainant; but we know of no principle upon which action which violates no right may be enjoined because in aid of another action which violates no right.

It is said that every person engaged in business which is subject only to state control has the right to pursue that business free from the regulation of the federal government. This is true; but the federal government here is not attempting regulation of plaintiff's business. It is merely making a loan and grant to a county which proposes to engage in a competing business, as such county has a right to do; and it is well settled that an act which is unauthorized, but which infringes no right of another, may not be enjoined merely because it will enable a third person to enter into competition with that other. *New Orleans M. & T. R. Co.* v. *Ellerman* 105 U. S. 166, 174; *U. S.* v. *Dern* 63 App. D. C. 28, 68 Fed. (2d) 773; *Keen* v. *Mayor* 101 Ga. 588, 29 S. E. 42; *Milwaukee Horse & Cow Com. Co.* v. *Hill* 207 Wis. 420, 241 N. W. 364, 369.

A case very much in point is the Chicago Junction case 264 U. S. 258. That suit was brought to enjoin an order of the Interstate Commerce Commission which authorized a competing railroad to acquire certain terminals, an action which would result in loss of business to complainant. A majority of the court held that complainant had standing to challenge the order, but only because of provisions of the Transportation Act of 1920. The minority dissented on the ground that that statute was not applicable; but the doctrine that in the absence of that statute complainant would have had no standing, because none of its rights was invaded, was accepted by the entire court. In *Sprunt & Son* v. *United States* 281 U. S. 249, 254, it was held that a shipper had no standing to challenge an order of the Commission which eliminated a rate differential that gave the shipper an advantage over competitors, because such order violated no right of the shipper although resulting in economic loss to him. To the same effect is the decision in *Edward Hines Trustees* v. *United States* 263 U. S. 143, 148.

In passing upon this question, we must not lose sight of the fact that the suit before us is one against the Administrator in his individual capacity to enjoin him from action alleged to infringe the rights of plaintiff. The question of authority on his part becomes material only where it appears that a right of plaintiff will be infringed by his proposed action. If such right is infringed, authority of a valid law will justify action which would otherwise not be justified; but, if no right is infringed, authority or lack of authority is immaterial. The proposed action of the Administrator of which complaint is made is the making of the loan and grant to the county. No one will contend that if such loan and grant were to be made by the Administrator from his own funds or from the funds of a private person, plaintiff would have any standing to enjoin it; and we cannot see that the source of the funds can affect the question of invasion of rights, where plaintiff has no such interest in

the funds as it could protect by injunction. *Frothingham* v. *Mellon, supra.*

The question here under consideration has arisen in a number of cases involving loans and grants by the Administrator of Public Works, and in all of them the decision has been in accord with the views which we have expressed. See *Alabama Power Co.* v. *Ickes* (D. C. App.) ..... Fed. (2d) .....; *Arkansas-Missouri Power Co.* v. *Kennett* (C. C. A. 8th) 78 Fed. (2d) 911; *Allegan* v. *Consumers Power Co.* (C. C. A. 6th) 77 Fed. (2d) 477; *Kansas Utilities Co.* v. *City of Burlington* 141 Kan. 926, 44 P. (2d) 223.

THE QUESTION OF COSTS.

The action of the court below in taxing one-half of the costs against the defendant was based upon the fact that the defendant county and the members of its finance board resisted the application for plaintiff to intervene in the case of *Park* v. *Greenwood County* when that case was pending before the Supreme Court of South Carolina. In this we think there was error. The Supreme Court of South Carolina held, and we must assume properly, that the plaintiff had no right to intervene in that case. We have decided here, not only that the statute complained of was constitutional and that the action of the Administrator of Public Works was authorized thereunder, but also that no right of plaintiff was invaded by the proposed action of the Administrator which would give it any standing in court to contest his action. Under such circumstances we can perceive no reason why plaintiff should not be taxed with the full cost of the litigation or why the defendants should be penalized with taxation of any part of the costs for defending it. Certainly, the opposition of defendants to the intervention of plaintiff in a suit in which it had no right to intervene is no sufficient reason for such taxation, and particularly is this true of the defendant Ickes

who was not a party to the action in the state court and is not shown to have had anything to do with the resistance offered to plaintiff's motion.

Ordinarily, it is true, the taxation of costs in an equity suit is a matter resting in the sound discretion of the trial court and its action with respect thereto will not be reviewed on appeal; but this discretion is to be exercised "not arbitrarily, but with reference to the general principles of equity and special circumstances of each case". *Kell* vs. *Trenchard* (C. C. A. 4th) 146 Fed. 245. And where, as here, the entire decree and the proceedings of the lower court are before us, it is proper for us to consider whether the discretion was properly exercised. *Citizens Bank* v. *Cannon* 164 U. S. 319, 323; *The Scotland* 118 U. S. 507, 519; *Trustees* v. *Greenough* 105 U. S. 527. Under the circumstances here, we think there was no ground for taxing any part of the costs against defendants and that, as to that feature, the decree appealed from should be reversed.

The decree appealed from will accordingly be affirmed except as to the taxation of costs against the defendants, as to which it will be reversed.

SOPER, Circuit Judge: (dissenting)

The conclusion of fact was reached in the prior dissent in this case, (*Greenwood County* vs. *Duke Power Co.*, 81 F. (2d) 986, 999), that the Federal Administrator of Public Works had assumed the authority to reduce the rates for electric energy charged by private corporations engaged in intrastate business, and that he had accomplished this purpose through his control of federal funds distributable under the provisions of Title II of the National Industrial Recovery Act. The conclusion was supported by reference to the public utterances of the Administrator in which he condemned as exorbitant the prices charged by utility companies in general, and the

Duke Power Company in particular, and described his practice in cooperating with municipalities in the grant or refusal of federal funds to establish municipal plants so as to achieve the desired end. He announced that his policy had caused untilty companies to adjust their rates downward in wide areas.

With regard to the project of Greenwood County, the evidence showed that an investigation of the rates charged by the Duke Power Company in the area concerned was made by the Public Works Administration, and that the rates were considered to be excessive; and that the application of Greenwood County for federal funds to establish a competing plant was approved because the lower rates which it proposed to charge had been investigated by the Administrator and found to be reasonable and satisfactory. In furtherance of the policy of the Administrator, a provision was inserted in the first loan and grant agreement with Greenwood County that the Government should be under no obligation to advance the necessary money unless a resolution should have been adopted by the County providing for rates to be charged by it for electric energy satisfactory to the Administrator. Such rates were in fact promulgated by the County. The South Carolina Revenue Bond Act of 1933, Act No. 299, provided in Section 21 that rates for services to be furnished by such a municipal plant should be fixed precedent to the issuance of bonds; section 29 provided that such rates should not be subject to the supervision or regulation of any State Commission or like instrumentality or agency, and Act No. 1095 of the South Carolina Statutes at Large 1934, authorizing Greenwood County to borrow from the Public Works Commission the money to construct the plant, declared that the project was self liquidating and that any indebtedness created therefor should not be a direct and primary obligation of the County.

The additional evidence taken upon the last trial

in the District Court strongly supports the same conclusion. The administrator set up an agency known as the Electric Power Board of Review which from 1933 to March 16, 1935 had charge in an advisory capacity of the applications of municipalities desiring to establish electric power plants. During this period the loan and grant to Greenwood County was approved. The policy announced by members of this body and applied in numerous instances was precisely in accord with the Administrator's plans, and this course was followed not only when a proposal involving revenue bonds was under consideration, but also when general obligation bonds were offered by the municipality. The procedure was to give the established private power company an opportunity to put into effect a rate equal to or lower than the proposed municipal rate, and if this was done, the application of the municipality would be rejected unless it proposed a still lower rate, in which event, the utility was given another opportunity to make a further reduction. The controlling consideration in the establishment of competing plants was the matter of rates and the test applied was that such plants would be established only when the rates would serve as a yardstick to promote the policy of the Public Works Administration to bring about a general reduction of electric power rates.

It is true that since the decision of Judge Watkins in the court below, 10 F. Supp. 854, 12 F. Supp. 70, and the decision in *Arkansas-Missouri Power Co.* vs. *City of Kennett*, 78 F. (2d) 911, which pointed out the illegality involved in the practices of the Administrator, an attempt has been made to repudiate the public statements concerning the policies of the Administration which had been frequently and publicly made by subordinate officials; but these statements conformed so closely to the announcements of the Administrator that the attempt to abandon them amounts to little more than an expression of regret that what had been so widely proclaimed as a

praiseworthy public policy had become a source of danger to the establishment of municipal power projects. The District Judge found that there was in fact a change in the policy of the Administrator after he became doubtful of the validity of his prior acts, but so far as the proposal of Greenwood County is concerned, there was no change that affects the finding of fact that it was approved because it met the requirement that it would bring down the rates of the established local utility. The original contract of December 8, 1934 was revised on November 30, 1935, so as to include a paragraph denying to the Administrator and the Government the right or power to govern the rates to be fixed or charged for the services afforded by the project, excepting such rights as the Government might have as a holder of the municipal revenue bonds; but no new application for the loan and grant was made by the County, no new resolution of approval of the project by the Public Works Administration was given, and no change was made in the rates to be charged by the projected plant which had been adopted prior to the execution of the first contract and had received the approval of the Administrator. In fact, the County adopted a new resolution on December 6, 1935 by which the original rates were confirmed. The change in the contract was obviously made to meet, if possible, the legal objection that had been raised; but no change was made in the unauthorized and invalid condition upon which the proposal had been approved.

It is of course conceded that in the consideration of project for approval the Administrator must necessarily exercise an executive discretion and may properly take into account the question of rates in determining whether a proposed municipal power project will have a reasonable prospect of success. It is claimed on behalf of the Government that such was the extent of his action in this case. But the evidence is to the contrary. Possessing the conviction that the rates approved by State authority

were too high, he determined to use his power as an official of the national government to reduce them; and in carrying his purpose into effect he stepped across the line, went beyond the power conferred upon him by Congress and invaded the reserved powers of the States. If the National Industrial Recovery Act had provided that the power of the Administrator to make loans or grants to municipalities for the establishment of power plants should be exercised so as to reduce by competition the rates of private utilities approved by State authority, such a provision would surely have been unconstitutional. The Administrator proceeded as if such a provision were contained in the statute. The consent of the State in this instance does not save the situation because "state powers can neither be appropriated on the one hand nor abdicated on the other". *Carter* vs. *Carter Coal Co.*, 298 U. S. 238, 295-6.

We are not concerned here merely with the manifestations of an improper motive in the course of the exercise of a lawful power. We are confronted by the exercise of power not authorized by statute nor within the limitations of the Federal Constitution in pursuance of a policy publicly announced. The actions of the Administrator in this respect are of the same nature as the official conduct condemned in *Anchor Coal Co.* vs. *United States*, 25 F. (2d) 462; see also *Philadelphia* vs. *Stimson*, 223 U. S. 605, 620.

When these conclusions are reached, there is seen to be no substance in the argument that no right of the Power Company has been infringed and hence it is not entitled to an injunction. It has indeed no right to be shielded from lawful competition by the County or any other producer of electric power. *Puget Sound Power & Light Co.* vs. *Seattle*, 291 U. S. 619; *Madera Water Works Co.* vs. *Madera*, 228 U. S. 454. But it is entitled to relief against illegal competition which originates and is made effective through an agreement entered into in violation of the law of the land. *City of Camp-*

bell vs. *Arkansas-Missouri Power Co.*, 55 F. (2d) 560; *Frost* vs. *Corporation Commission of Okla.*, 278 U. S. 515. There is of course no parallel between the substantial loss of revenue which the Power Company would suffer as the result of the operation of the municipal plant and the injury to a federal taxpayer from an improper expenditure of federal funds which was held too insignificant to form the basis of a suit in *Frothingham* vs. *Mellon*, 262 U. S. 447.

(848) **DECREE.**

Filed and Entered August 6, 1937.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 4209.

Duke Power Company and Southern Public Utilities Company, Appellants and Cross-Appellees,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, Members of and Constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Appellees and Cross-Appellants.

CROSS-APPEALS from the District Court of the United States for the Western District of South Carolina.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Western District of South Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed except in so far as it taxes one-half of the costs against the defendants below, and as to this it is reversed, and the decree of the District Court is modified accordingly; and that the costs on this appeal and cross-appeal be paid by the appellants and cross-appellees.

August 6th, 1937.

JOHN J. PARKER,
Senior Circuit Judge.

(849) **CLERK'S CERTIFICATE.**

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing (Volumes I and II) is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 19th day of August, A. D., 1937.

(Seal of Court)

CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals, Fourth Circuit.

[fol. 850] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 25, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, and the case is set for hearing immediately following Nos. 84 and 85 and the cases are assigned for argument on Monday, December 6th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.